DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-842

Title:	Republic of Argentina, Petitioner v. NML Capital, Ltd.
Docketed:	January 9, 2013
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(11-4065, 11-4077, 11-4082, 10-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182)
Decision Date:	August 20, 2012
Rehearing Denied:	October 10, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 7 2013	Petition for a writ of certiorari filed. (Response due February 8, 2013)
Feb 1 2013	Order extending time to file response to petition to and including March 11, 2013.
Mar 11 2013	Brief of respondent NML Capital, Ltd. in opposition filed.
Mar 26 2013	Reply of petitioner Republic of Argentina filed.
Mar 27 2013	DISTRIBUTED for Conference of April 12, 2013.
Apr 15 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 22 2013	Supplemental brief of petitioner Republic of Argentina filed.
Dec 4 2013	Brief amicus curiae of United States filed.
Dec 18 2013	DISTRIBUTED for Conference of January 10, 2014.
Dec 18 2013	Supplemental brief of respondent NML Capital, Ltd. filed. (Distributed)
Jan 10 2014	Petition GRANTED.
Feb 11 2014	SET FOR ARGUMENT ON Monday, April 21, 2014
Feb 24 2014	Joint appendix filed. (Statement of costs filed.)
Feb 24 2014	Brief of petitioner Republic of Argentina filed.
Feb 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for respondent.
Mar 3 2014	Brief amici curiae of United States filed.
Mar 3 2014	Brief amicus curiae of The Clearing House filed. (Distributed)
Mar 10 2014	CIRCULATED.
Mar 21 2014	Record received from U.S.C.A 2nd Circuit is electronic. (Update on 03/31/2014 record received from U.S.C.A 2nd Circuit is also electronic).

Mar 21 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 26 2014	Brief of respondent NML Capital, Ltd. filed. (Distributed)
Mar 31 2014	Brief amici curiae of Competitive Enterprise Institute & Former State Department Officials filed. (Distributed)
Apr 2 2014	Brief amici curiae of Aurelius Entities filed. (Distributed)
Apr 2 2014	Brief amici curiae of South Carolina and 20 Other States filed. (Distributed)
Apr 2 2014	Brief amici curiae of Family Members and Estates of Victims of State-Sponsored Terrorism filed. (Distributed)
Apr 2 2014	Brief amici curiae of Montreux Partners, L.P., et al. filed. (Distributed)
Apr 2 2014	Brief amici curiae of Additional Family Members of Victims of State-Sponsored Terrorism filed. (Distributed)
Apr 2 2014	Brief amicus curiae of The Hispanic American Center for Economic Research filed. (Distributed)
Apr 2 2014	Brief amicus curiae of National Association of Manufacturers filed. (Distributed)
Apr 2 2014	Brief amicus curiae of Agudas Chasidei Chabad of United States filed. (Distributed)
Apr 2 2014	Brief amici curiae of The Judicial Education Project and Professors of Law filed. (Distributed)
Apr 2 2014	Brief amici curiae of Individual Bondholder Judgment Creditors filed. (Distributed)
Apr 2 2014	Brief amici curiae of Professors Lester Brickman and The Center for the Rule of Law filed. (Distributed)
Apr 2 2014	Brief amicus curiae of The Judicial Crisis Network filed. (Distributed)
Apr 14 2014	Reply of petitioner Republic of Argentina filed. (Distributed)
Apr 18 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 21 2014	Argued. For petitioner: Jonathan I. Blackman, New York, N. Y.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Theodore B. Olson, Washington, D. C.
Jun 16 2014	Adjudged to be AFFIRMED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Breyer, Alito, and Kagan, JJ., joined. Ginsburg, J., filed a dissenting opinion. Sotomayor, J., took no part in the decision of the case.
Jul 18 2014	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-842

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 1609 and 1610(a) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, limit execution on property of a foreign state to "property . . . in the United States . . . used for a commercial activity in the United States."

Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits.

LIST OF PARTIES

The petitioner in this case is the Republic of Argentina (Defendant-Appellant below). The respondent is NML Capital, Ltd. (Plaintiff-Appellee below).[1]

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[1] The caption of the underlying decision of the Second Circuit Court of Appeals incorrectly includes EM Ltd., Bank of America, and numerous Argentine entities. The Republic informed the court of appeals of this error, but the caption was never amended.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Republic of Argentina (the "Republic") respectfully prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 695 F.3d 201. The order of the district court compelling discovery (Pet. App. B) is not published.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing *en banc* was denied on October 10, 2012 (Pet. App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1604, 1605(a), 1606, 1609, and 1610(a) and (d), are reprinted at Pet. App. F.

STATEMENT OF THE CASE

This petition presents the important question, on which the courts of appeals are now divided, whether Rule 69(a) of the Federal Rules of Civil Procedure permits a United States court to order post-judgment discovery of property of a foreign state that could not be the subject of execution under the FSIA.

Section 1605 of the FSIA provides for subject matter jurisdiction to adjudicate claims *in personam* against a foreign state if one or more of the exceptions to sovereign immunity listed in that section, including waiver of immunity to jurisdiction, exists. Section 1610(a) provides for a considerably narrower scope of execution of a judgment on the property of a foreign state by limiting execution, even if there is a separate waiver of immunity to execution, to "property . . . in the United States . . . used for a commercial activity in the United States." The Second Circuit, disagreeing with the Seventh, Ninth, and Fifth Circuits, held that the existence of jurisdiction over a foreign state under Section 1605 is sufficient to permit post-judgment discovery in aid of execution on property that could not be the subject of execution under Section 1610(a).

A. Background

Between 1998 and 2002, the Republic experienced the worst economic crisis of its modern history, marked by an enduring recession, fiscal imbalance, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca ¶¶ 4–13, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. June 11, 2003); Decl. of Federico Carlos Molina ¶ 3, *NML*

Capital, Ltd. v. Republic of Argentina, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Mar. 24, 2005); *see also* Paul Blustein, *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina* 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period.[2] *See* Blustein, *supra*, at 1.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. "[U]nable to service its debts," the Republic had no choice but to defer interest and principal payments to its bondholders. *See* Panel of

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[2] The Argentine crisis has been described as the "worst-case scenario" in eight centuries of modern financial crises. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises*, at 51 (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf; *see also* Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children.").

Independent Advisers, *Economic and Financial Issues Facing Argentina*, Report to the Government of Argentina and the International Monetary Fund, ¶ 1 (July 29, 2002), *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm. Like many nations that have faced economic crisis and unsustainable indebtedness, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, *Alexander Hamilton: A Biography* 163–88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt.[3]

Because there is no bankruptcy regime for insolvent states, the Republic restructured its external debt on an entirely voluntary basis. The Republic did not repudiate that debt. Instead, consistent with United States policy favoring the orderly and consensual restructuring of sovereign debt, the Republic

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[3] The United States, the international financial community, and the federal courts have all recognized the importance of voluntary sovereign debt restructuring. *See, e.g.*, Brief for the United States as *Amicus Curiae* in Support of Reversal, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L), 2012 WL 1150791, at *6–10 (2d Cir. Apr. 4, 2012); Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), 2004 WL 5475206, at *2–6 (S.D.N.Y. Jan. 12, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("[T]he United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures . . .").

restructured its unsustainable debt burden through two global exchange offers in 2005 and 2010, in which participating holders exchanged old, nonperforming bond interests for new, performing bond interests with lower interest rates, reduced principal, and/or longer maturities. The exchange offers were extended to all beneficial owners of eligible bonds—including respondent NML Capital, Ltd. ("NML")—on the same terms, and reflected the Republic's commitment to treat its private creditors equitably. Owners tendered over 91% of the aggregate eligible debt in the exchange offers (a supermajority that would be more than sufficient to "cram down" respondent and other "holdouts" under most bankruptcy regimes), making the Republic's sovereign debt restructuring the largest in history at that time. *See* Republic of Argentina, Annual Report (Form 18-K), at 17 (Sept. 30, 2011), *available at* http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm. NML declined to participate in either restructuring.

B. Respondent NML

Plaintiff-Respondent NML is a Cayman Islands hedge fund, established exclusively to buy distressed Republic debt, that acquired beneficial interests in Republic bonds at a deep discount both immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. NML and similar "vulture" hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign context by bringing lawsuits for the face value of defaulted sovereign debt, obtaining judgments on which interest

continues to run indefinitely, and then using aggressive means to try to execute them.[4]

NML has used these aggressive tactics against the Republic, while at the same time continuing to speculate in nonperforming Republic debt, filing a new complaint against the Republic as recently as 2009 on more than $100 million of defaulted Republic bond interests that it purchased in late 2008. *See NML Capital, Ltd. v. Republic of Argentina*, No. 09 Civ. 1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009). NML's enforcement tactics include a series of execution attempts against property of the Republic and other entities[5] that the federal courts have in most cases

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[4] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Jan. 7, 2013) ("[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts. . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure.") (internal quotation marks omitted); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

[5] These entities are presumptively separate from the Republic and therefore presumptively immune from execution on Republic debt.

rejected as violating the FSIA,[6] and an attempt in March 2005 to disrupt the settlement of the Republic's global exchange offer by attaching—on an *ex parte* basis—the nonperforming bonds tendered by their beneficial owners into that exchange. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005) (affirming vacatur of this attachment). They also include—of particular interest here—similar unsuccessful efforts to enforce its United States

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See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626–27 (1983) ("*Bancec*") ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.") (citation and footnote omitted).

[6] *See, e.g.*, *NML Capital, Ltd. v. Banco Central De La República Argentina*, 652 F.3d 172, 196–97 (2d Cir. 2011) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied sub. nom*, *EM Ltd. v. Republic of Argentina*, 133 S. Ct. 23 (2012); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130–31 (2d Cir. 2009) (rejecting attempt by NML and others to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States"), *cert. denied*, 130 S. Ct. 1691 (2010); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465–66 (2d Cir. 2007) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied*, 522 U.S. 818 (2007); *NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011) (rejecting NML's attempt to execute on satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-00197 (CKK), 2005 U.S. Dist. LEXIS 47027 (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C., and Maryland).

judgments outside the United States, ranging from an attempt to attach taxes owed to the Republic in France,[7] to attempts to attach diplomatic bank accounts in France[8] and Belgium,[9] to the attempted seizure of an Argentine naval vessel in Ghana,[10] in each case without any claim by NML that it needed discovery from a United States court to pursue these legally improper execution efforts.[11]

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[7] *See NML Capital, Ltd. v. Republic of Argentina*, Cour d'appel [CA] [regional court of appeal] Paris, 4e pôle 8e ch., Dec. 9, 2010, No. 10/00390 (Fr.) (appeal pending to the Cour de Cassation [French Supreme Court]).

[8] *See NML Capital, Ltd. v. Republic of Argentina*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html.

[9] *See Republic of Argentina v. NML Capital, Ltd.*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 22, 2012, No. C.11.0688.F/1 (Belg.).

[10] Order, *The "ARA Libertad Case" (Argentina v. Ghana)*, International Tribunal for the Law of the Seas (ITLOS) (Dec. 15, 2012), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf.

[11] Most recently, NML has sought to enjoin the Republic from paying any interest on its restructured debt unless it also pays 100% of NML's defaulted debt, an issue that is now before the Second Circuit after that court initially upheld NML's claim to injunctive relief but remanded to the district court for clarification of key aspects of the scope of the injunction. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012), *on remand*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (stayed by the Second Circuit on Nov. 28, 2012).

C. The District Court Authorizes NML To Obtain Worldwide Discovery From Bank Of America And Banco De La Nación Argentina, And The Court of Appeals Affirms

In 2010, NML embarked on an unprecedented discovery campaign aimed at information pertaining to what it characterized as the Republic's international "financial circulatory system." *See NML Capital v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012) (Pet. App. A at 5); *see also* Hr'g Tr. at 10, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. Dec. 17, 2010) ("Dec. 17 Hr'g Tr.") (Pet. App. D at 60). As part of this effort, NML served subpoenas on Bank of America and Banco de la Nación Argentina ("BNA") on March 10, 2010, and June 14, 2010, respectively. The subpoenas sought expansive information regarding not only the Republic's assets, but also those of hundreds of Argentine public officials from the Republic's President and deceased former President on down, and separate entities (both state-owned and private), with no attempt in any instance to limit the requests to property even arguably used for a commercial activity in the United States.[12] To the

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[12] Plaintiff's subpoena served on Bank of America defines the Republic as including 136 public officials, 43 independent entities, and 148 purported "Ministries" and "Secretariats" of the Republic, as well as countless "agencies, ministries, instrumentalities, political subdivisions, employees, attorneys, representatives, affiliates, subsidiaries, predecessors, successors, alter-egos, and assigns." *See* NML Notice of Subpoena served on Bank of America, N.A., dated Mar. 10, 2010, *NML Capital, Ltd. v. Republic of Argentina*, No. 11-5065-cv(L), Joint Appendix Volume III, A-

contrary, NML made it clear that it intended the discovery requests to cover *all* property of the Republic and the hundreds of other parties and entities named in the subpoena, including property located outside the United States and property not used for a commercial activity.

The Republic moved to quash the Bank of America subpoena on May 17, 2010, and Bank of America joined. NML later moved to compel BNA and Bank of America to comply with the subpoenas, which the Republic and both banks opposed. Among other things, the Republic argued that because execution on property of a foreign state under the FSIA is limited to "property in the United States of a foreign state . . . used for a commercial activity in the United States," 28 U.S.C. § 1610(a) (Pet. App. F at 92), discovery of property *outside* the United States, and therefore by definition not subject to execution under the statute, is neither

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662–80 (2d Cir. Nov. 15, 2011). It demanded, *inter alia*, documents concerning "[e]ach asset or property of any kind whatsoever which Argentina owned directly or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially." *Id.* at A-673. The subpoena NML served on BNA was equally expansive, defining the Republic to include 225 entities, including all "agencies, instrumentalities, ministries, political subdivisions, representatives, [and] State Controlled Entities," and demanding documents concerning "any property, assets or accounts maintained at BNA *anywhere* in the name of Argentina or for Argentina's benefit." *See* NML Notice of Subpoena served on Banco de la Nación Argentina, dated June 14, 2010, *NML Capital Ltd.*, Joint Appendix Volume IV, A-900–09 (2d Cir. Nov. 15, 2011) (emphasis added); Attachment to letter from Joshua I. Sherman to Mark S. Sullivan, dated July 20, 2010, *NML Capital Ltd.*, Joint Appendix Volume VIII, A-1599–1606 (2d Cir. Nov. 15, 2011).

permissible under the FSIA nor relevant as a matter of law to execution under it.

After initially noting the unprecedented nature of NML's extraterritorial asset discovery request at a hearing on December 17, 2010, *see* Dec. 17 Hr'g Tr. at 17 (Pet. App. D at 66) ("I really think that now the discovery is taking a shape that it has not taken before, . . . you are seeking information about assets located in foreign countries"), the district court concluded at a second hearing that it could serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Hr'g Tr. at 30, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) ("Aug. 30 Hr'g Tr.") (S.D.N.Y. Aug. 30, 2011) (Pet. App. C at 31) (emphasis added). It orally granted NML's motions to compel and denied the Republic's, BNA's, and Bank of America's objections to the subpoenas as well as the motion to quash, confirming the ruling by written Order on September 2, 2011 (the "Extraterritorial Asset Discovery Order") (Pet. App. B).

The Republic appealed the district court's decision to the Second Circuit, contending that the Extraterritorial Asset Discovery Order violated the FSIA by permitting discovery on assets: 1) located outside the United States; 2) not used for a commercial activity in the United States; and 3) belonging to entities and officials that are not the Republic. NML responded that the FSIA places no limitation on discovery in aid of judgment enforcement, and that the FSIA is irrelevant because the discovery was propounded to third-party banks.

By decision dated August 20, 2012, the Second Circuit Court of Appeals adopted these arguments and affirmed the Extraterritorial Asset Discovery Order.[13] It specifically held that the FSIA does not limit post-judgment discovery on assets of a foreign state in aid of execution of a United States court's judgment, and that the FSIA's limits on execution had no bearing on the scope of such discovery. *See NML Capital*, 695 F.3d at 209 (Pet. App. A at 16) ("Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery."). Instead, as to post-judgment discovery in aid of execution, the Second Circuit held that "[o]nce the district court had

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[13] NML also argued that the Republic had waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit did not discuss this point, no doubt because NML had never raised it in the district court (and therefore forfeited the argument), and because the Second Circuit, like every other court to consider the issue, had previously held that despite a waiver of immunity, a court's power is still limited to what the FSIA permits. *See EM Ltd. v. Republic of Argentina*, 473 F.3d at 481 n.19 (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("If a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States. . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria.") (internal quotation marks omitted)); *Aurelius Capital Partners*, 584 F.3d at 129–30 (*Id.*).

subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over *any other party*," and that "the banks' compliance with the subpoenas will cause Argentina *no burden* and *no expense*." *Id.* at 209–10 (Pet. App. A at 18–19) (emphasis added).[14] In reaching this conclusion, the Second Circuit expressly rejected the opinion of the Seventh Circuit in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012), *see NML Capital*, 695 F.3d at 209 (Pet. App. A at 18), which had held that "general-asset discovery" of a foreign state's property violates the FSIA, *see Rubin*, 637 F.3d at 799, and it disregarded the views of the United States, which has consistently supported the Seventh Circuit's position, *see* Brief for the United States of America as *Amicus Curiae*, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2012 WL 1891593 (May 25, 2012) (hereinafter "U.S. *Rubin* Certiorari *Amicus*"); Brief for the United States as *Amicus Curiae* Supporting Reversal, *Rubin v. Islamic Republic of Iran*, No. 08-2805, 2009 WL 8132813 (7th Cir. June 26, 2009) (hereinafter "U.S. *Rubin* 7th Cir. *Amicus*").

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[14] The one limitation the Second Circuit saw as applicable, which was not based on the FSIA, but is simply a general principle of discovery, was the court's authority to order discovery in a "prudential and proportionate way." *NML Capital*, 695 F.3d at 207 (Pet. App. A at 14). That limitation appears itself illusory, as under no definition of those terms could worldwide discovery of hundreds of entities be in any way deemed "prudential and proportionate."

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Second Circuit's decision directly conflicts with decisions of other circuits, this Court's longstanding precedent, and the expressed interests and views of the United States Government, all of which oppose the Second Circuit's holding that the FSIA imposes no limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world. The Second Circuit's decision has created a clear conflict among the courts of appeals on the interpretation of the FSIA, a statute expressly enacted to provide uniformity in the treatment of foreign sovereigns in United States courts. The decision also disregards this Court's recent precedent on giving effect to Congress's determination of the geographic scope of federal statutes and imperils the foreign relations of the United States and its own rights as a litigant abroad.

I. THE SECOND CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH OTHER CIRCUITS ON WHETHER THE FSIA PLACES ANY LIMITATION ON POST-JUDGMENT ASSET DISCOVERY

Congress enacted the FSIA in 1976 with the express purpose of providing a uniform body of law to govern the sovereign immunity of foreign states in United States courts. *See, e.g.*, *Bancec*, 462 U.S. at 622 n.11 ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign

sovereign to suit in United States courts." (internal quotation marks omitted)); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631, 6632 (noting Congress's intent to promote a "uniformity in decision" in "cases involving foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"). The holding of the Second Circuit that the FSIA places no limitation on post-judgment discovery concerning assets of a foreign state undermines this uniformity and directly contradicts decisions of the Seventh, Fifth, and Ninth Circuits. This Court's review is therefore warranted.

The Seventh Circuit's decision in *Rubin*, 637 F.3d 783, represents the weight of authority on the application of the FSIA to post-judgment asset discovery. There, the Seventh Circuit reversed a district court order permitting "general-asset discovery" of all Iranian property located in the United States. *See id.* at 799. The Seventh Circuit noted that Rule 69(a), which governs all post-execution proceedings, including discovery in aid of execution, specifically states that "a federal statute governs to the extent it applies." *Id.* at 794–95 (citing Fed. R. Civ. P. 69(a)(1)). It therefore held that, "the FSIA plainly applies and limits the discovery process" when a party seeks discovery of a foreign state's assets in aid of judgment enforcement. *Id.* at 795.

In reaching this conclusion, the Seventh Circuit explicitly rejected the Second Circuit's reliance on the existence of jurisdiction over the foreign state judgment debtor as the basis for subjecting it and its property to

general discovery under Rule 69. The Seventh Circuit emphasized the distinction between immunity from suit, *see* 28 U.S.C. §§ 1604–1605 (Pet. App. F at 89–91), and immunity from attachment and execution, *see* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94), noting the indisputable fact that the exceptions to immunity from attachment and execution are considerably narrower than the exceptions to jurisdictional immunity, *see Rubin*, 637 F.3d at 796–97. The Seventh Circuit reasoned that although a United States court may have subject matter jurisdiction over a foreign state for the purpose of adjudging its liability, executing on a foreign state's assets raises distinct immunity considerations. *Id.* at 797. Because one of the purposes of sovereign immunity is to "shield foreign states" from "unwarranted litigation costs and intrusive inquiries," *id.* at 796–97, the court concluded that prior to obtaining discovery of a foreign state's property, a plaintiff "must identify the specific property that is subject to attachment and plausibly allege that an exception to 1609 attachment immunity applies," *id.* at 799.

The Seventh Circuit agreed with decisions of the Fifth and Ninth Circuits (as well as the clear implication of an earlier decision from the Second Circuit itself), all of which stated that post-judgment discovery concerning property of a foreign state should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination," which means, in the post-judgment context, immunity from attachment or execution. *See id.* at 796 (quoting, *e.g.*, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir.

2002) (instructing district court as to proper scope of discovery on remand); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007)); *see also Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011) (holding that execution must be limited to specifically identified property within the United States that falls within an exception to immunity under Section 1610; "Insofar as petitioners complain that the Banks successfully moved to quash subpoenas *duces tecum* in prior proceedings in the Southern District of New York, petitioners there sought information pertaining to China's assets *outside* the United States, which were held categorically immune from execution under the FSIA." (emphasis in original)); *cf. First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53 (2d Cir. 2002) (FSIA jurisdiction based on commercial activity in the United States continues post-judgment to include discovery of the foreign state judgment debtor's assets; "Rafidain, having participated in commercial banking transactions in the United States, submitted itself to the jurisdiction of the United States courts, as well as to the procedures and legal responsibilities associated with such jurisdiction, *to the extent those procedures and responsibilities are related to its commercial activities in the United States*." (emphasis added)).

Despite this pervasive authority, the Second Circuit reached the sweeping and remarkable conclusion that the FSIA places *no* limitation on a party's ability to seek post-judgment discovery concerning the assets of a foreign state located *anywhere* in the world. *See NML Capital*, 695 F.3d at 609 (Pet. App. A at 16). The Second Circuit recognized that its holding ran directly contrary to that of the Seventh Circuit in *Rubin*, but

nonetheless "respectfully disagree[d]" with that holding, concluding that discovery does not implicate a foreign state's immunity from execution or attachment because discovery does not itself attach a sovereign's property. *See id.* at 208–09 (Pet. App. A at 15–17). The Second Circuit thus found that the FSIA's limits on execution were irrelevant to discovery that has the sole purpose of aiding in that very execution, holding that it was enough that a district court has "subject matter and personal jurisdiction" over a foreign state. *See id.* at 209 (Pet. App. A at 18). This reductionist argument, which conflated the broader scope of jurisdiction under Section 1605 of the FSIA with the narrower scope of attachment and execution-related remedies under Section 1610, was specifically rejected by the Seventh Circuit. *See Rubin*, 637 F.3d at 797 (noting critical error in plaintiffs' contention that once a "court has exercised jurisdiction over a foreign sovereign and entered a judgment against it," a plaintiff is entitled "to the same broad discovery as any other litigant seeking to execute on a judgment under Rule 69(a)").

The Second Circuit also held that the FSIA has no application in the instant case because plaintiff served its expansive discovery requests on third-party banks rather than the Republic itself. *See NML Capital*, 695 F.3d at 210 (Pet. App. A at 19). Although the subpoenas seek detailed account information *of* the Republic, hundreds of its agencies or instrumentalities, and hundreds of its officials (including its current and deceased former president), *see id.* at 204 (Pet. App. A at 6), the Second Circuit viewed only the banks as the affected parties, and concluded that "the banks' compliance with the subpoenas will cause Argentina *no* burden and *no* expense," *id.* at 210 (Pet. App. A at 19)

(emphasis added). This holding also conflicts with the Seventh Circuit's reasoning in *Rubin*.

In *Rubin*, the Seventh Circuit properly recognized that even when execution immunity is not raised by the state itself (there, although discovery was served on the state judgment debtor Iran, the original claim of execution immunity was raised by private persons holding Iranian property), the court must nonetheless address it, because, "[t]he immunity inheres in the property itself." 637 F.3d at 799. The same logic applies to post-judgment discovery in aid of execution on that property. It is the sovereign nature of the property and its use that gives rise to the immunity in each instance, not who raises the immunity claim.

Unlike the Second Circuit, the Seventh Circuit recognized in *Rubin* the "burdens of litigation" from which sovereign immunity is intended to shield a foreign state, including the "cost and aggravation of discovery," as well as the "intrusive inquiries" that result from sweeping discovery requests like the ones present here. *Rubin*, 637 F.3d at 795, 796–97. One would be hard pressed to find a more intrusive inquiry than a "forensic examination" of the financial affairs of a foreign state's current and late president, as well as the state itself and hundreds of its separate agencies or instrumentalities. The Second Circuit's refusal to acknowledge that discovery of immune property burdens parties beyond those actually served with it is irreconcilable with the rationale set forth by the Seventh Circuit. Not only will discovery of this kind inevitably spill over into equally intrusive discovery of the party itself, but common sense suggests that when third parties are forced to submit to costly discovery

devices because they have done business with, and therefore have information regarding, a state, those costs will be passed on to the state in one form or another.

The Seventh Circuit's conclusion that discovery in aid of execution must be limited to property of the foreign state used for a commercial activity in the United States, because only property fitting that definition falls within the enforcement jurisdiction of United States courts under Section 1610 of the FSIA, *id.* at 794 (holding general asset discovery "incompatible with the text, structure, and history of the FSIA"); *id* at 799, applies equally to discovery served on a foreign state and discovery served on a third party concerning that foreign state's assets. In either case, the discovery is sought for the purpose of executing on the sovereign's property. It cannot be seriously argued, for instance, that discovery about a state's diplomatic bank accounts or military property served on a non-party bank or military contractor would not be just as intrusive and detrimental to sovereign immunity principles as such discovery served on the state itself. But the Second Circuit's ruling treats the former as raising no issue under the FSIA.[15]

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[15] The Second Circuit suggested that such concerns might be addressed as a matter of "privilege" and not sovereign immunity. *See NML Capital, Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012)(Pet. App. A at 19–20). But it did not articulate what "privilege" would apply or why a privilege claim regarding discovery directed to a third party would not face the usual difficulties that exist when the holder of a privilege tries to assert it over a third party's documents. *See, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 484–86 (10th Cir.

On this point too, the Second Circuit's false distinction between permitting discovery from a foreign state itself and permitting that same discovery from a third party conflicts with the reasoning and result in *Rubin*.

It is noteworthy that NML and its attorneys have themselves argued to this Court that *Rubin* directly conflicts with Second Circuit precedent on whether the FSIA limits discovery into the assets of a foreign state, and that this circuit split requires this Court's review. After the Seventh Circuit's decision, plaintiffs in *Rubin* petitioned this Court for certiorari, and NML's counsel represented petitioners as counsel of record before the Court, undoubtedly because of NML's interest in the same issue that was then pending before the Second Circuit in the instant case. Petitioners contended, *inter alia*, that the Seventh Circuit's decision in *Rubin* "undermines th[e] congressionally prescribed uniformity" in the treatment of sovereign nations in United States courts, and that "[t]his Court's review is warranted to resolve this circuit split and provide much-needed guidance regarding the scope of discovery available to judgment creditors under the FSIA." Petition for Writ of Certiorari, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2011 WL 4642674, at *10, *16 (Oct. 6, 2011). NML and other vulture funds then

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2011) (declining to extend the doctrine of *Perlman v. United States*, 247 U.S. 7 (1918), which allows appeal by holder of attorney-client privilege from order compelling production of documents by third party in criminal grand jury proceedings, as "[t]he underpinnings of the *Perlman* rule . . . simply do not apply with equal force to a subpoena directed at a non-party as part of discovery in civil litigation"), *cert. denied sub. nom*, *NATSO, Inc. v. 3 Girls Enters.*, 132 S. Ct. 1004 (2012).

submitted a brief as *amicus curiae* in support of petitioners, "agree[ing] with petitioners that review is warranted to resolve this Circuit conflict." Brief of NML Captial, Ltd., *et al.*, as *Amici Curiae* in Support of Petitioners, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2011 WL 5402978, at *4 (Nov. 7, 2011). At the time, NML's position was seriously overstated, because the Second Circuit had then *not* disagreed with *Rubin* and its prior precedent did not furnish a different reading of the FSIA, and this Court denied the petition. *See Rubin v. Islamic Republic of Iran*, 133 S. Ct. 23 (2012). Now, the circuit split that NML claimed indeed does exist, and this Court's review is therefore warranted, just as NML itself urged (albeit then prematurely) in its *Rubin* petition.

II. THE SECOND CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH THIS COURT'S PRECEDENT THAT FEDERAL STATUTES ARE PRESUMED TO APPLY DOMESTICALLY, NOT EXTRATERRITORIALLY

Besides the direct circuit split, the Extraterritorial Asset Discovery Order is also at odds with this Court's decision in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), which reaffirmed "the longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 2877 (internal quotation marks omitted). The Court in *Morrison* considered and rejected the Second Circuit's extraterritorial application of Section 10(b) of the Securities and Exchange Act of 1934, reasoning that irrespective of

Congress's power to exercise its prescriptive jurisdiction and regulate entities abroad that engage in conduct that might affect the United States, "Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* at 2877–78. Accordingly, the Court held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878.

The same reasoning applies with greater force to the FSIA, a jurisdictional statute. "[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). It also "provides the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 496 (1983) ("The statute must be applied by the District Courts in every action against a foreign sovereign," and "[a]s the House Report clearly indicates, the primary purpose of the Act was to 'set forth comprehensive rules governing sovereign immunity'" (quoting H.R. Rep. No. 94-1487, at 12 (1976))); *Conn. Bank*, 309 F.3d at 252 (noting that prior to enactment of the FSIA, foreign sovereigns enjoyed absolute immunity from execution against their property). Under the FSIA, a federal court may exercise jurisdiction over a sovereign to adjudge its liability only if a statutory exception to immunity from suit applies, *see* 28 U.S.C. §§ 1604–1605 (Pet. App. F at 89–91), and it may provide post-judgment execution remedies to a judgment creditor only if a statutory exception to immunity from execution applies, *see* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94). Discovery

in aid of execution squarely falls within the category of post-judgment execution remedies. *See* Fed. R. Civ. P. 69(a); H.R. Rep. No. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("The term 'attachment in aid of execution' [in § 1610(a)] is intended to include attachments, garnishments, and *supplemental proceedings* available under applicable Federal or State law to obtain satisfaction of a judgment. *See* Rule 69, Fed. R. Civ. P.") (emphasis added); *accord* Brief of the United States as *Amicus Curiae* in Support of Appellant, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107, at *27–28 (D.C. Cir. Oct. 7, 2010) (hereinafter "U.S. *FG Hemisphere Amicus*"). Indeed, the Second Circuit itself acknowledged that the district court's authority to issue the Extraterritorial Asset Discovery Order derived "from its power to conduct *supplementary proceedings*." *See NML Capital*, 695 F.3d at 208 (Pet. App. A at 16) (emphasis added).

Accordingly, where a state's liability has already been determined and a judgment creditor is seeking to enforce its judgment, as is the case here, a court's authority to order discovery in aid of execution is circumscribed by Section 1610. *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011) ("Discovery requests in aid of execution may be made pursuant to either the federal rules or the corresponding rules of the forum state, but either way, the FSIA plainly applies and limits the discovery process.") (citation omitted); *Af-Cap*, 475 F.3d at 1096 (discovery in aid of execution should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination") (internal quotation marks omitted); *Conn. Bank of Commerce*,

309 F.3d 240, 260 n.10 (5th Cir. 2002) (*Id.*). The power of United States courts to order post-judgment asset discovery is not a freestanding one, but derives from and is necessarily limited by the underlying power to order execution on such assets as Congress permits. That power is clearly limited to property in the United States. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.").

Morrison makes clear that such a "hint" of extraterritorial application must be expressed by Congress in the language of the relevant statute, not implied by a court because it thinks it is a good idea in a specific case. Here, the language of the statute could not be clearer that Congress did *not* intend extraterritorial application. Section 1609 of the FSIA states that "the property *in the United States* of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611," and Section 1610 states that "property *in the United States* of a foreign state . . . used for a commercial activity *in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States" if one or more of the listed exceptions in Section 1610(a)(1)–(7) are satisfied. *See* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94) (emphasis added). Congress did not intend extraterritorial application

when it made these specific references to "the United States" and to nowhere else.

Ignoring the statutory limitation, the district court issued the Extraterritorial Asset Discovery Order, declaring that it would serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*," Aug. 30 Hr'g Tr. at 29-30 (Pet. App. at 31) (emphasis added), and the Second Circuit affirmed its authority to do so. The Extraterritorial Asset Discovery Order thus conflicts with this Court's extraterritoriality jurisprudence as most recently enunciated in *Morrison*, and warrants review on this basis, too.

III. THE PETITION PRESENTS A PURELY LEGAL DISPUTE ON A RECURRING ISSUE OF CRITICAL IMPORTANCE TO THE FOREIGN POLICY CONCERNS OF THE UNITED STATES

The importance of the issue presented by this petition is clear: in the last six years, the United States has filed at least six briefs as *amicus curiae* in which it has presented its view that the FSIA restricts post-judgment discovery of property of a foreign sovereign, and that failing to recognize the FSIA's limitations on such discovery could cause grave harm to the foreign relations of the United States and the treatment of the United States in litigation abroad.[16] Until recently, the

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[16] *See, e.g.*, U.S. *Rubin* Certioriari *Amicus*, 2012 WL 1891593, at *11–12; Brief for the United States of America as *Amicus Curiae* in Support of Reversal, *NML Capital, Ltd. v. Banco Central de la*

courts of appeals had uniformly agreed with this position; now the Second Circuit has clearly rejected it, and this Court should grant review to protect the important interests the United States has raised.

This petition squarely presents this issue: the Extraterritorial Asset Discovery Order targets property outside the United States that could not under any circumstances be the subject of execution under the FSIA. As the Second Circuit acknowledged, NML has "already obtained discovery on Argentina's assets in the United States, and so the new information it will receive pursuant to the Discovery Order relates *only* to Argentina's assets abroad." *See NML Capital*, 695 F.3d at 207 n.6 (Pet. App. A at 11 n.6) (emphasis added). Whether the FSIA prevents this is a pure question of law that this Court should resolve.

Apart from the issue of statutory interpretation, the United States has repeatedly emphasized that limiting discovery in accordance with the substantive limits of Sections 1609 and 1610 of the FSIA is necessary to advance the comity and reciprocity that underlie the FSIA and are an important part of United States policy. As made clear by the United States, extensive

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República Argentina, No. 10-1487-cv(L), 2010 WL 4597226, at *9–10 (2d Cir. Nov. 3, 2010); U.S. *FG Hemisphere Amicus*, 2010 WL 4569107, at *28–29; U.S. *Rubin* 7th Cir. *Amicus*, 2009 WL 8132813, at *13–15; Brief for the United States of America as *Amicus Curiae* in Support of Affirmance at 24 n.5, *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir. June 25, 2009) (hereinafter "U.S. *Peterson Amicus*"); Third Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03-cv-9370 (N.D. Ill. Nov. 16, 2007).

discovery into a foreign state's assets may be regarded as an affront to, or "impugn[,] the state's dignity," damaging the relationships of the United States with other nations. U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *11–12; *see also* U.S. *Peterson Amicus* at 24 n.5 ("U.S. court orders permitting private litigants to take discovery from foreign states regarding their worldwide assets, even though those assets are not within the court's execution authority under the FSIA, could cause harm to our foreign relations."). Moreover, "'some foreign states base their sovereign immunity decisions on reciprocity;'" *i.e.*, the treatment provided to foreign sovereigns by United States courts. U.S. *Rubin* Certioriari *Amicus*, 2012 WL 1891593, at *12 (quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984)). Accordingly, expansive discovery on the assets of a foreign state may have consequences for the "extensive" property held by the United States overseas "as part of its worldwide diplomatic and security missions." *Id.* These well-founded concerns further argue for review by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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28 U.S.C. § 1605(a)
28 U.S.C. § 1606
28 U.S.C. § 1609
28 U.S.C. § 1610(a)
28 U.S.C. § 1610(d) . . . . . App. 89

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2011

Docket Nos. 11-4065-cv(L),
11-4077-cv(CON), 11-4082-cv(CON),
10-4100-cv(CON), 11-4102-cv(CON),
11-4117-cv(CON), 11-4118-cv(CON),
11-4133-cv(CON), 11-4153-cv(CON),
11-4165-cv(CON), 11-4182-cv(CON)

[Argued: April 23, 2012
Decided: August 20, 2012]

EM LTD.,

Plaintiff,

NML CAPITAL, LTD.,

Plaintiff-Appellee,

-- v. --

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ADMINISTRACION NACIONAL DE

SEGURIDAD SOCIAL, UNION DE ADMINISTRADORAS DE FONDOS DE JUBILACIONES Y PENSIONES, ARAUCA BIT AFJP S.A. CONSOLIDAR AFJP S.A., FUTURA AFJP S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP S.A., PROFESION AUGE AFJP S.A.,

Defendants,

BANK OF AMERICA, N.A.,

Intervenor.

Before: WALKER, McLAUGHLIN and CABRANES, Circuit Judges.

Defendant-Appellant the Republic of Argentina appeals from the September 2, 2011 order of the District Court for the Southern District of New York (Thomas P. Griesa, Judge) granting Plaintiff-Appellee NML Capital, Ltd.'s motion to compel non-parties Bank of America and Banco de la Nación Argentina to comply with subpoenas duces tecum, and denying Argentina's motion to quash the subpoena issued to Bank of America. We hold that the district court's order compelling compliance with the subpoenas does not infringe on Argentina's sovereign immunity. AFFIRMED.

THEODORE B. OLSON, Gibson, Dunn & Crutcher LLP, Washington, DC (Robert A. Cohen, Dennis H. Hranitzky, Eric C. Kirsch, Dechert

LLP, New York, NY, Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, DC, on the brief), for Plaintiff-Appellee.

JONATHAN I. BLACKMAN (Carmine D. Boccuzzi, Christopher P. Moore, on the brief), Clearly Gottlieb Steen & Hamilton LLP, New York, NY, for Defendant-Appellant.

JOHN M. WALKER, JR., Circuit Judge:

In these consolidated appeals, we consider the scope of discovery available to a plaintiff in possession of a valid money judgment against a foreign sovereign. Specifically, we review an order of the District Court for the Southern District of New York (Thomas P. Griesa, Judge) compelling two non-party banks to comply with subpoenas duces tecum seeking information about Argentina's assets located outside the United States. Argentina argues that the banks' compliance with the subpoenas would infringe on its sovereign immunity. We conclude, however, that because the district court ordered only discovery, not the attachment of sovereign property, and because that discovery is directed at third-party banks, Argentina's sovereign immunity is not affected.

BACKGROUND

In December 2001, Defendant-Appellant the Republic of Argentina defaulted on payment of its external debt. While most of Argentina's bondholders agreed to voluntary restructurings in 2005 and 2010,

others, including Plaintiff-Appellee NML Capital, Ltd. ("NML"), did not. Beginning in 2003, NML filed eleven actions in the Southern District of New York to collect on its defaulted Argentinian bonds. Jurisdiction in the district court was premised on Argentina's broad waiver of sovereign immunity in the bond indenture agreements.[1] The district court has entered five money judgments in NML's favor totaling (with interest) approximately $1.6 billion. It has also granted summary judgment to NML in the remaining six actions, in which NML's claims total (with interest) more than $900 million. Argentina has not satisfied these judgments and NML has thus attempted to execute them against Argentina's property. This litigation has involved lengthy attachment proceedings before the district court and multiple appeals to this

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[1] The waiver states, in part,

> To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled . . . to any immunity from suit, . . . from attachment prior to judgment, . . . from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

Joint Appendix 1127.

court.[2] Here we will recite only the facts relevant to the instant appeals.

NML has pursued discovery concerning Argentina's property located in the United States since 2003. In 2010, "[i]n order to locate Argentina's assets and accounts, learn how Argentina moves its assets through New York and around the world, and accurately identify the places and times when those assets might be subject to attachment and execution (whether under [U.S. law] or the law of foreign jurisdictions)," NML served the subpoenas at issue in these appeals on two non-party banks, Bank of America ("BOA") and Banco de la Nación Argentina ("BNA"). NML Br. at 9. From the materials sought in these subpoenas, NML hoped to gain an understanding of Argentina's "financial circulatory system." Joint Appendix ("JA") 1021.

NML served the first subpoena, directed at BOA, on March 10, 2010. The subpoena seeks documents relating to all BOA accounts maintained by or on behalf of Argentina without territorial limitation. JA 672. In particular, it requests documents sufficient to identify the opening and closing dates of Argentina's accounts, current balances, and transaction histories

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[2] For additional background on Argentina's default and the resulting litigation, see, for example, NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 256 & n.4 (2d Cir. 2012); NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 175-76 (2d Cir. 2011); Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 124-27 (2d Cir. 2009); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 466 & n.2 (2d Cir. 2007).

from 2009 through the production date. JA 667, 672. It also requests from BOA documents relating to electronic fund transfers sent through the SWIFT system.[3] JA 672-73. The BOA subpoena defines "Argentina" broadly to include Argentina's "agencies, ministries, instrumentalities, political subdivisions [and] employees," as well as Argentina's current president, Cristina Fernández de Kirchner, and her late husband, former president Néstor Carlos Kirchner. JA 666, 674.

NML served the second subpoena on BNA, an Argentinian bank with a branch in New York City, on June 14, 2010. JA 900-09. The BNA subpoena requests documents relating to any assets or accounts maintained at BNA by Argentina or for Argentina's benefit, any debts owed by BNA to Argentina, and transfers into or out of Argentina's accounts, including documents identifying the transfer counterparties. JA 908-09. Again, "Argentina" is broadly defined to include "its agencies, instrumentalities, ministries, political subdivisions, representatives, State Controlled Entities . . . , and all other Persons acting or purporting to act for or on behalf of Argentina." A "State Controlled Entity" is defined to include any entity controlled or more than 25% owned by Argentina. JA 903-04.

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[3] SWIFT (which stands for Society for Worldwide Interbank Financial Telecommunication) is an electronic messaging system that provides instructions to banks, brokerages, and other financial institutions for money transfers. Most transactions denominated in dollars are routed through banks in New York. JA 667, 1874-76.

After the subpoenas were served, Argentina, later joined by BOA, moved to quash the BOA subpoena. Both banks then set forth objections to the subpoenas, and NML moved to compel their compliance. Before the district court ruled on the objections and motions, NML agreed to modify its subpoenas, including by allowing BOA to exclude lower-level Argentinian officials from searches of SWIFT messages. NML also agreed to enter into a protective order that would permit the banks to designate documents as confidential and require that those documents receive confidential treatment by all parties. At an August 30, 2011 hearing, and in a subsequent September 2, 2011 order (the "Discovery Order"), the district court denied the motion to quash and granted the motions to compel. JA 1881, 1900-01, 1915-16. At the hearing, the district court approved the subpoenas in principle, indicating that it had made its final determination that extraterritorial asset discovery did not infringe on Argentina's sovereign immunity, and reaffirmed that it intended to serve as a "clearinghouse for information" in NML's efforts to find and attach Argentina's assets. JA 1868, 1881. The district court stated, however, that it expected the parties to negotiate further on the specific production requests contained in the subpoenas, saying that the subpoenas must include "some reasonable definition of the information being sought." JA 1868. For example, the district court noted that "there is no use getting information about something that might lead to attachment in Argentina because that would be useless information" as no Argentinian court would allow sovereign property to be attached within the country. JA 1868. Thus, the district court, while open to discovery of assets abroad, sought to limit the

subpoenas to discovery that was reasonably calculated to lead to attachable property.

Following the district court's ruling, NML and BOA negotiated further modifications to the subpoenas, including by designating search keywords.[4] BOA has begun producing documents pursuant to the subpoena. With respect to the BNA subpoena, NML agreed to limit the requested individuals to the current and most recent former president, and to exclude all documents relating to assets or transfers exclusively within Argentina. JA 1932, 1940. According to NML, BNA neither engaged in negotiations nor complied with the subpoena. On December 14, 2011, the district court ordered BNA's compliance with the modified subpoena by January 6, 2012. See Order, NML Capital, Ltd. v. Republic of Argentina, No. 03-cv-8845 (S.D.N.Y. Dec. 14, 2011), ECF No. 452.

Argentina, but not the banks, appealed the district court's September 2, 2011 Discovery Order.

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[4] On December 2, 2011, NML moved this court to supplement the record on appeal with communications among it, the banks, and the district court reflecting negotiations that occurred after September 2, 2011, the date the district court entered the Discovery Order. See Mot. to Supplement the Record, No. 11-4065-cv(L) (2d Cir. Dec. 2, 2011), ECF No. 112. Because we have sufficient information to decide these appeals based on the materials in the record and the district court dockets, of which we take judicial notice, the motion to supplement the record is DENIED. See Fed. R. App. P. 10(e); Jeffreys v. United Techs. Corp., 357 F. App'x 370, 372-73 (2d Cir. 2009); Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987).

DISCUSSION

Argentina challenges the Discovery Order's legal premise that compliance with the subpoenas does not infringe on Argentina's sovereign immunity. It argues that the Discovery Order, by compelling disclosure about Argentinian assets abroad, violates the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., which provides the sole source of federal court jurisdiction over foreign nations, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35 (1989). We hold that because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed. The district court therefore did not abuse its discretion in ordering BOA and BNA to comply with NML's subpoenas.

I. Jurisdiction

Before turning to the merits, we first address NML's contention that we lack subject matter jurisdiction to consider these appeals because the Discovery Order is not a "final decision" under 28 U.S.C. § 1291. The issue arises here in the context of supplemental post-judgment proceedings instituted by NML to facilitate the execution of its judgments against Argentina. See Fed. R. Civ. P. 69(a). In post-judgment litigation, the "final decision" is not the underlying judgment that the plaintiff is attempting to enforce, but the subsequent judgment that concludes the collection proceedings. See In re Joint E. & S. Dists. Asbestos Litig., 22 F.3d 755, 760 (7th Cir. 1994). The Discovery Order is not a "final decision" in this sense

because it does not terminate NML's collection proceedings against Argentina. Under the collateral order doctrine, however, a decision is "final" if it (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. Lora v. O'Heaney, 602 F.3d 106, 111 (2d Cir. 2010); see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (enumerating same three requirements). Most orders granting discovery are not final decisions because they are effectively reviewable on appeal from a final judgment, see Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 606 (2009), or by an appeal from a contempt citation after the target of a subpoena resists the challenged order, see Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992); In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001, 490 F.3d 99, 106-07 (2d Cir. 2007).

Under the particular circumstances of this appeal, however, the district court's decision granting discovery is a collateral order that is immediately appealable. Cohen's first two requirements are easily met. First, the district court indicated that the Discovery Order represented its final determination that extraterritorial asset discovery did not infringe on Argentina's sovereign immunity.[5] Second, the scope of discovery

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[5] We consider the Discovery Order to be district court's final word despite its direction that NML and the banks continue to negotiate the details of the subpoenas. See JA 1907, 1946-47. Argentina's appeal concerns only the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity, and not the

available to NML is separate from the merits issue of whether NML can execute against a particular asset to satisfy its judgments.

Cohen's third factor is satisfied because Argentina will be unable to obtain effective review in a United States court of the Discovery Order through a later appeal of a final judgment. Because the Discovery Order grants NML discovery respecting foreign assets, any future attachment or collection proceeding would be conducted in a foreign court.[6] Argentina would have no further opportunity to challenge the Discovery Order in this or any other United States court. Moreover, depending on the laws of the jurisdictions where any attachable property is located, NML may be able to levy Argentina's foreign assets directly, without instituting a separate proceeding, rendering the Discovery Order unreviewable by any court. See Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221,

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parameters of the document requests. See Trans. of Oral Argument on Mot. to Stay at 4, NML Capital, Ltd. v. Republic of Argentina, No. 11-4065-cv(L) (2d Cir. Nov. 1, 2011), in JA 1943, 1946 (counsel for Argentina stating that the subpoenas were subject to modification on the details and that its appeal did not concern "the details").

[6] NML argues that the subpoenas may allow it to discover the location of Argentinian assets in the United States, as well as assets held abroad. However, NML has already obtained discovery on Argentina's assets in the United States, and so the new information it will receive pursuant to the Discovery Order relates only to Argentina's assets abroad. NML's speculation that it might uncover assets in the United States that were somehow missed by its earlier discovery requests is too remote to alter our jurisdictional analysis.

1225 (7th Cir. 1993) (recognizing that an order granting discovery may be a final, appealable order where the "sole object of [a post-judgment] proceeding is discovery of the judgment debtor's assets" and the assets discovered may then be levied without a court order). Finally, because the Discovery Order does not direct compliance from Argentina itself, Argentina cannot obtain review through disobedience and contempt. See Church of Scientology, 506 U.S. at 18 n.11; Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010). Although the record before us is silent on BNA's compliance (or lack thereof), that BOA has begun production suggests that it would rather comply than risk being held in contempt of court.

In sum, because the Discovery Order conclusively resolves the discovery issue, is separate from the merits, and will be unreviewable through a later appeal in the United States, we have jurisdiction to consider Argentina's appeal.

II. Merits

Turning to the merits, Argentina argues that the Discovery Order violates the FSIA by requiring disclosure about assets Argentina claims are immune from attachment.

We review the district court's order for abuse of discretion. See Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 79 (2d Cir. 2012); United States v. Rigas, 583 F.3d 108, 125 (2d Cir. 2009). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or

rendered a decision that cannot be located within the range of permissible decisions." In re Sims, 534 F.3d 117, 132 (2d Cir. 2008) (citations, alterations, and internal quotation marks omitted). A district court has broad latitude to determine the scope of discovery and to manage the discovery process. See, e.g., In re Agent Orange Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2008).

At the outset, we note that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts. Post-judgment discovery is governed by Federal Rule of Civil Procedure 69, which provides that "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment. See id.; Fed. R. Civ. P. 26(b)(1) (allowing a court to "order discovery of any matter relevant to the subject matter involved in the action"); First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 54 & n.3 (2d Cir. 2002) ("Rafidain II"); Libaire v. Kaplan, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011). New York state's post-judgment discovery procedures, made applicable to proceedings in aid of execution by Federal Rule 69(a)(1), have a similarly broad sweep. The New York Civil Practice Law and Rules provides that a "judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment." N.Y. C.P.L.R. § 5223; see David D. Siegel, New York Practice § 509 (5th ed. 2011) (describing § 5223 as "a broad criterion authorizing investigation through any

person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts"). Of course, as in all matters relating to discovery, the district court has broad discretion to limit discovery in a prudential and proportionate way. See Fed. R. Civ. P. 26(b)(2); see, e.g., Crawford-El v. Britton, 523 U.S. 574, 598-99 (1998).

It is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets. See Fed. R. Civ. P. 69(a)(2) (permitting discovery "from any person"); see, e.g., G-Fours, Inc. v. Miele, 496 F.2d 809, 810-12 (2d Cir. 1974) (upholding contempt citation against judgment debtor's wife and debtor's wholly-owned corporation for failing to respond to a discovery request pursuant to Rule 69); Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 561 (S.D.N.Y. 1977) (permitting discovery against the judgment debtor's bank "insofar as it relates to the existence or transfer of [the judgment debtor's] assets"); ICD Grp., Inc. v. Israel Foreign Trade Co. (USA) Inc., 638 N.Y.S.2d 430, 430 (1st Dep't 1996) (permitting discovery from debtor's accountant, citing the rule allowing discovery from "any third person with knowledge of the debtor's property"); see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3014 (2d ed. 2012) (third persons may be examined about the assets of the judgment debtor so long as the motive is not to harass the third party).

Nor is it unusual for the judgment creditor to seek disclosure related to assets held outside the jurisdiction of the court where the discovery request is made. See Rafidain II, 281 F.3d at 54 ("A judgment creditor is

entitled to discover the identity and location of any of the judgment debtor's assets, wherever located.") (quoting Nat'l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982)); Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 238-39 (S.D.N.Y. 2011) (subpoena on New York branch of Indian bank "reaches all responsive materials within the corporation's control, even if those materials are located outside New York"); Raji v. Bank Sepah-Iran, 529 N.Y.S.2d 420, 423-24 (Sup. Ct. 1988) (allowing discovery into judgment debtor's foreign assets). Thus, in a run-of-the-mill execution proceeding, we have no doubt that the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States.

Argentina argues, however, that the normally broad scope of discovery in aid of execution is limited in this case by principles of sovereign immunity. Argentina maintains that its property abroad is categorically immune from attachment, and that the district court cannot order discovery into those assets. Without reaching the unanswered question of whether the FSIA extends immunity to property held outside the United States, we reject Argentina's argument for two reasons.

First, the Discovery Order does not implicate Argentina's immunity from attachment under the FSIA. It does not allow NML to attach Argentina's property, or indeed have any legal effect on Argentina's property at all; it simply mandates BOA and BNA's compliance with subpoenas duces tecum. We recognize that a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign

countries. However, the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments. Rafidain II, 281 F.3d at 53-54; cf. Riggs v. Johnson Cnty., 73 U.S. 166, 187 (1867) ("Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."). Thus in Rafidain II we held that a "waiver by a foreign state [of sovereign immunity], rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." 281 F.3d at 53-54; Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.3d 280, 297 (2d Cir. 2011); see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 637 F.3d 373, 380 (D.C. Cir. 2011) (upholding contempt sanctions against foreign sovereign for failing to comply with general asset discovery order); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477-78 (9th Cir. 1992) (holding that an instrumentality of a foreign nation must respond to discovery about its worldwide assets and that it could not use the FSIA to conceal its assets from the district court). Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery. Whatever hurdles NML will face before ultimately attaching Argentina's property abroad (and we have no doubt there will be some), it need not

satisfy the stringent requirements for attachment in order to simply receive information about Argentina's assets.

The Seventh Circuit came to a different conclusion in Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), holding that the FSIA requires a judgment creditor to identify specific non-immune assets before it is entitled to further discovery about those assets. Id. at 796. We respectfully disagree with the Seventh Circuit to the extent it concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign. Such a result is not required by the FSIA and is in conflict with our holding in Rafidain II that a district court's jurisdiction over a foreign sovereign extends to proceedings to enforce a valid judgment. Nor does our holding in EM, 473 F.3d 463, cited by the Seventh Circuit, support the result in Rubin. In EM, a case primarily about attachment, the district court denied a discovery request after determining that the judgment creditor made no showing of a reasonable basis to assume jurisdiction over the entity against whose funds it wished to execute a judgment. Id. at 486. That ruling was well within the district court's discretion to limit discovery where the plaintiff had not demonstrated any likelihood that the discovery it sought related to attachable assets. But EM did not hold that the discovery request would violate the FSIA.

The Discovery Order, moreover, does not infringe on any immunity from the district court's jurisdiction that

Argentina otherwise might enjoy. Argentina does not (and could not) argue that the district court lacked subject matter or personal jurisdiction over it because Argentina expressly waived any claim to immunity in the bond agreements. See, e.g., NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 257 (2d Cir. 2012); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 481 & n.18 (2d Cir. 2007). Once the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules. First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998) ("Rafidain I"). Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable; it therefore cannot dispute that the district court has jurisdiction to order discovery designed to aid in enforcing those judgments.

In this vein, it is important to distinguish discovery requests made before a court conclusively has jurisdiction over a foreign sovereign from those made after such jurisdiction has been ascertained. Where a plaintiff seeks to initially establish that the court has subject matter jurisdiction over a sovereign, discovery and immunity are almost invariably intertwined. See Rafidain I, 150 F.3d at 174-76 (noting that the district court must engage in a "delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery'" where it was unclear if the defendant had a claim to jurisdictional immunity)

(quoting Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992)). Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be "circumspect" in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign defendant under the FSIA. Id. at 176-77. But NML seeks discovery from a defendant over which the district court indisputably had jurisdiction. Thus, the concerns voiced in Rafidain I are not present and our precedents relating to jurisdictional discovery are inapplicable.

The second principal reason for holding that the Discovery Order does not infringe on Argentina's sovereign immunity is that the subpoenas at issue were directed at BOA and BNA--commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege. Thus, the banks' compliance with subpoenas will cause Argentina no burden and no expense. See id. at 177 (holding that discovery requests directed at non-immune party did not infringe on the sovereign immunity of a third party, even if the third party retained a colorable claim of immunity). To the extent Argentina expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege and not a claim of immunity. The FSIA says nothing about privilege. Indeed it appears that Congress intended for courts to handle claims of privilege using the existing procedures under the Federal Rules. See H.R. Rep. No. 94–1487, at 23 (1976) ("The [FSIA] does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. . . . [If] a private plaintiff sought the production of sensitive governmental documents of a foreign state,

concepts of governmental privilege would apply."). NML has agreed to enter into a protective order with the banks, see NML Br. at 21 n.6, and Argentina and the banks can avail themselves of the other protections contained in the Federal Rules and our precedents as necessary to protect any confidential information.[7] We are confident that these mechanisms will provide Argentina all the protection to which it is entitled. And, if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others, to the extent that immunity has not been waived. The Discovery Order at issue here, however, does nothing to endanger Argentina's sovereign immunity.

CONCLUSION

For the foregoing reasons, the district court's order is AFFIRMED.

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[7] To the extent Argentina is attempting to keep sensitive data about its finances away from NML--i.e., to prevent NML from collecting on its judgments--its concerns are entitled to no weight.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Nos: 03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)
07 Civ. 2690 (TPG)
07 Civ. 6563 (TPG)
08 Civ. 2541 (TPG)
08 Civ. 3302 (TPG)
08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

[Filed: September 2, 2011]

NML CAPITAL, LTD.,

Plaintiff,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

OPINION

On May 17, 2010, the Republic of Argentina moved to quash a subpoena dated March 10, 2010 served by NML Capital, Ltd. ("NML") on non-party Bank of America, N.A. On August 9, 2010, NML cross-moved to compel Bank of America to comply with the subpoena.

On November 1, 2010, NML moved to compel non-party Banco de la Nacion Argentina ("BNA") to comply with a subpoena dated June 14, 2010 served by NML on BNA.

For the reasons stated on the record at the hearing held on August 30, 2011, the court grants plaintiff's motions to compel Bank of America and BNA to comply with the subpoenas, subject to modifications of details. The court denies the Republic's motion to quash the subpoena served on Bank of America.

This opinion resolves the motions listed as document numbers 306 and 365 in case 03 Civ. 8845, as well as the same motions in the related cases.

SO ORDERED.

Dated: New York, New York
September 2, 2011

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 CV 2507(TPG) and 03 CV 8845(TPG)

New York, N.Y.
August 30, 2011
2:55 p.m.

EM Ltd., et al.,
Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

NML CAPITAL, LTD,
Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

Before:

HON. THOMAS P. GRIESA
District Judge

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* * *

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[THE COURT:]

Let's go on to the other matters before the Court.

I think the principal one is the discovery problem. Can somebody address that?

MR. COHEN: Thank you, your Honor.

Robert Cohen from Dechert for NML.

Just to set the table a little bit, your Honor, we were here in December. At that time there were motions to compel and motions to quash subpoenas to three nonparty banks. The acronym BNA is the Banco de la Nacion Argentina, and that is a government-owned bank that has a branch here in New York. The second one was to an entity called the Bank for International Settlements which is located in Switzerland. And the third was a subpoena to Bank of America located here in New York. And each of those subpoenas has slightly

different issues that have been raised with respect to them, but they have an overarching purpose.

THE COURT: When were the subpoenas issued?

MR. COHEN: From March to October of 2010.

THE COURT: 2010, OK.

MR. COHEN: When we were here in December, your Honor

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was focused on whether there was a real world purpose for all of this discovery, was this something that could yield information that could result in attachable assets someplace in the world. And that was where we left it in December and you sent us back to do a little additional briefing to elucidate principally three issues.

The first was a little bit more about what kinds of assets are attachable in the U.S. under the Foreign Sovereign Immunities Act. And I think your Honor told us the answer to that this morning in your discussion about Weltover and the nature of property that is susceptible to attachment. And the one thing that I think is worth repeating from what came out of that this morning, contract rights are attachable rights. And one of the things that we think this discovery will reveal, potentially, are existing contracts by various Argentine entities around the world, but in the U.S. as well, to acquire equipment like, perhaps, the Honeywell acquisition of parts for their satellite.

The second question we had since I was urging that this discovery could be used to find assets abroad was how do other countries approach the issue of attaching, seizing sovereign assets. And our brief gave you some examples from England, from France, from Switzerland, from Germany and from Belgium where those courts have embraced the notion that "commercial property" is available for attachment. And in

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fact, the interpretation of commercial property in many of those jurisdictions is even broader than under the FSIA.

And since that briefing has been completed, your Honor, NML has obtained what commentators have called a landmark decision in Belgium, and I have a copy which I can leave with your Honor. In June of this year, the Court of Appeals in Brussels confirmed an attachment that we had served on a bank in Brussels, Fortis Bank, and the account that we had attached was the account of the embassy in Brussels.

Argentina argued that those kinds of accounts are immune and that the waiver of immunity that is contained in the fiscal agency agreement that covers these bonds was not specific enough to be a waiver of diplomatic property.

And the Brussels court for the first time said a waiver as broad as that that is found in the fiscal agency agreement which waives immunity to the full extent permitted by law in any of the jurisdictions

where we are seeking to attach includes diplomatic property and affirmed that attachment of the diplomatic bank account.

THE COURT: Was the Brussels court trying to apply the concept to commercial activity?

MR. COHEN: It does have a concept of commercial activity, and it found that a diplomatic bank account used to buy things is not immune and you need no special waiver, no special language in a waiver of immunity to allow a judgment

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creditor like NML to seize that property.

Similarly, your Honor, in England recently we had a case before the Supreme Court of England -- it is like our Supreme Court -- it used to be the House of Lords. You get there by the equivalent of a petition for certiorari. In that situation, your Honor, we were simply seeking to have one of our U.S. judgments recognized in England so that we could pursue recovery.

Argentina resisted tenaciously, and they told the court our motive -- and they were right in part -- for wanting to register our judgment there was because we might seek to seize the proceeds of future securities offerings if they took place in England. They recognized that we would be able to do that in England if we had a judgment, that is, they go to market and try to raise money by issuing new bonds, we might be able to seize the proceeds of those bonds in England. And we

succeeded at the trial court level defeating their arguments. The Court of Appeals reversed on all of the grounds. And the Supreme Court in what, again, commentators say is a landmark decision under English jurisprudence --

THE COURT: Do you mean the House of Lords?

MR. COHEN: It used to be the House of Lords. Two years ago they created the Supreme Court. They took the law lords and put them in a separate body called the Supreme Court.

THE COURT: What did they hold?

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MR. COHEN: They held that the waiver of immunity and the consent to jurisdiction were sufficient to allow them to recognize our judgment. That was one of the key holdings.

There was two other holdings that reconciled some inconsistencies that the lower courts had found with respect to the Code of Civil Procedure.

THE COURT: In both England and Belgium, you are trying to enforce the judgments you are trying to enforce here?

MR. COHEN: That's right, your judgments.

THE COURT: Maybe the courts of the world are getting a little sick of Argentina's lawlessness.

MR. COHEN: Then I won't go on to France and Switzerland but they are going to get sick of it soon to, but we are proceeding in all of those jurisdictions.

To bring this back to the discovery that we are seeking, your Honor, we are asking the three banks to provide us with information about the business of Argentina, what contracts do they have, where have they transferred money.

Let me take it back, for example, to BNA. BNA is the Bank of Argentina. It is the largest bank in Argentina. It has branches throughout Argentina, in New York, in Florida and abroad. New York BNA is a unified entity. It has a branch in New York. It is registered with the Banking Department.

We served a subpoena on BNA and said, tell us about accounts anywhere in your bank. We are not seizing them. We

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are not trying to take any money now. This is simply discovery. Tell us about movements of funds from those accounts, where it went. Do you have any notes that are due? Have you lent money to Argentina? Let us understand what Argentina is doing through your institution.

And we have listed ministries -- ministries like the ministry that bought the scientific equipment that your Honor found we could attach. You may remember it was something called an AMTP account -- that is an acronym for the Ministry of Science and Technology.

We learned about that account, that it was at BNA here in New York. Argentina argued that that was used for scientific and educational purposes and couldn't be attached.

And your Honor described why that was wrong, that you said that it was the fundamental kind of commercial activity, buying equipment. You don't look to the purpose. You look to the nature of the activity. And an account used to buy scientific equipment is certainly attachable. That was your ruling, and we think it was exactly right.

THE COURT: Can I just interrupt.

It seems to me, and this has been discussed before but probably not with the precision and incisiveness you are suggesting now -- let me interrupt myself.

A long time ago in this case I said, and there really was no objection by the Republic, that this court would be a

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clearinghouse for information about commercial activity or other activity that might lead to attachments or executions anywhere in the world, and there was an attempt to get information from the Republic. And I don't remember exactly what happened, but there was no objection to that. So I still have the intention of treating this court as a clearinghouse for information.

The problem I have is that there should be some reasonable definition of the information being sought. Also, there is no use getting information about something that might lead to an attachment in Argentina because that would be useless information, for obvious reasons.

And I don't see that in your subpoenas there is sufficient definition. In other words, if you want to find out from the New York branch of BNA or BNA in general what transactions the Republic has, what accounts the Republic has, everything that the Republic does with that bank, it seems to me that is too broad because I have no reason to believe that everything that the Republic did with BNA would lead to attachable property.

My problem is with making it clear that, as far as BNA, that things that might be conceivably attachable in Argentina are not being inquired about and, beyond that, for things outside the Republic, I don't sense that there is a sufficient definition.

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MR. COHEN: Your Honor, we agree that it would be futile to try to attach assets in Argentina.

THE COURT: Right.

MR. COHEN: We think that the burden of determining whether particular transactions will lead to assets that we can attach somewhere in the world is a burden that we ought to be able to assume and

pursue. The burden on BNA to produce this information is minimal, we think.

THE COURT: Why is it minimal?

MR. COHEN: Because they can run through their computer systems, properly instructed, the names of the accounts that we are asking for.

THE COURT: They could what?

MR. COHEN: Through their computer systems, they could ask for information about all of the ministries that we have listed. We say, tell us about Argentina and any of its ministries, to shorten the definition. So, for example, the Ministry of Science and Technology, do you have an account anywhere in the bank for this entity?

They can run that name through their system and give us an answer. If the answer is yes, we ask them to tell us about transactions that were conducted in that account for a limited period of time. And we will take that information and determine whether or not it is suggestive of a commercial transaction to buy goods, to invest money someplace.

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We will keep this information confidential. We will use it only for the purposes of this litigation. We have no interest in sharing that information with anyone or using it for any other purpose. It will be a forensic exercise to uncover assets.

Bank of America similarly, they have wire transfer information on what is called a SWIFT system. Every day they get hundreds and hundreds of subpoenas, both from the government and from private parties, where they are obligated to put into their system the names of the parties who are the subject of the subpoena and produce information with respect to that, historical information.

We are not trying to interfere with transactions. We will take that information about a wire transfer from a ministry in Argentina -- I used this example last time -- to Mercedes-Benz in Germany where it says acquisition of trucks in the subject matter of the SWIFT message, and we will do the homework necessary to find that transaction and go wherever it takes us.

Bank of America, to the extent it has any burden at all, we will share the cost of it. We will take off of their hands any manual work they say they have to do.

The one complaint that they made, your Honor, was that we included a list of individuals. And we have voluntarily agreed to withdraw the names of the individuals.

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They say we have not done any narrowing. Well, we have. We addressed the burden that Bank of America has suggested that they would have to bear if the subpoena was compelled to be responded to.

* * *

[MR. COHEN:]

The burden is minimal. And we think that all three of these subpoenas, your Honor, will yield information that has the potential to actually end this litigation. You need to have a little courage to give it to us. We are not talking about jurisdictional discovery. We are not even talking about execution on any particular asset. All that we are talking about is discovery.

There is nothing in the Foreign Sovereignty Immunities Act that even talks about discovery. In fact the legislative

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history says that the rules in place are sufficient to deal with discovery issues that arise under the Foreign Sovereign Immunities Act. Argentina, since the beginning of this litigation, has tried to conflate the issues of jurisdictional discovery and execution with normal asset search discovery.

Now, we have some unfortunate decision out of the Seventh Circuit that you will hear about, the Rubin case that said a judgment creditor can only get discovery with respect to execution if he can identify the asset. We think that is wrong. There is a petition for certiorari being prepared.

But in contrast to that, your Honor, there is a decision out of the D.C. Circuit, in an FG Hemisphere case which focused on whether a district court could enter sanctions for a sovereign's failure to provide execution related discovery, asset discovery. And in

that case, the discovery that the Democratic Republic of Congo failed to provide was discovery relating to assets around the world. The District Court ordered them to produce it. They wouldn't produce it.

The District Court imposed sanctions of, I think it was $1,000 a day, and the D.C. Circuit affirmed the imposition of the sanctions. It said, I don't have to get to the question of whether the court had the authority to order discovery about assets abroad because nobody raised it. Nobody raised it until the government raised it in amicus on appeal. So the idea that the D.C. circuit would approve sanctions for failure to provide

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discovery related to assets worldwide suggests that they think it is perfectly permissible for the District Court to do that.

I suggest, your Honor, it is time for this Court to help us find these assets. The burden is minimal and we will share it. We ask that our subpoenas, that you compel response to the subpoenas.

And we are happy to propose orders, your Honor, that would take care of the issue --

THE COURT: Talk about the Bank of America for a minute.

MR. COHEN: Sure.

THE COURT: Why did you select the Bank of America? Do you have some reason to believe that the

Republic or its ministries have accounts at the Bank of America?

MR. COHEN: We think that the Bank of America serves as an intermediary bank because it is one of the -- what we call -- money center banks, and all transactions that are done in dollars move through -- most of them -- move through the money center banks in New York. We picked Bank of America because it is a very big bank and it was likely to be involved in the movement of funds, dollar funds through New York.

THE COURT: Are you talking about the possibility of accounts in the name of the Republic or of accounts in the name of a ministry?

MR. COHEN: These are not even accounts, although we

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do ask if they have any accounts, but the focus of our discovery is where they have been served as an intermediary bank for the movement of money from Argentina --

THE COURT: How would that be recorded with the Bank of America?

MR. COHEN: They get a SWIFT message. SWIFT is an acronym.

THE COURT: What is that? I don't know what it is.

MR. COHEN: It is Society for Worldwide ernational Fund Transfers. That is the acronym. I believe it is a bank-owned entity -- not solely Bank of America, but it is an entity that provides the service of electronic communications with respect to the transfer of funds, sort of like wire transfer information.

So you give a SWIFT instruction to your local bank in Argentina. Let's say the Ministry of Science and Technology wants to send money to that Mercedes-Benz producer in Germany. It will say to its bank, send dollars X to Mercedes-Benz' bank which is Deutsche Bank in Germany. That will go through a money center bank. It will get a SWIFT message: Take from our account in this bank and transfer to the bank there. And it will have a line that will say the purpose of the transfer. We want to see all of the SWIFT messages that Bank of America has --

THE COURT: The SWIFT message is a message -- go over

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it again -- from whom to whom?

MR. COHEN: It is a message from the bank of the Argentine entity. So let's say the Ministry of Science and Technology tells its bank, and let's say it is BNA -- probably not, but let's say it is BNA -- I need to send money to Germany. The bank will create a SWIFT message.

THE COURT: Well, BNA is not just going to send money to Germany. BNA, presumably, the ministry has an account at the bank?

MR. COHEN: Yes, at the bank in Argentina.

THE COURT: So there is someplace to get the money from?

MR. COHEN: Yes.

THE COURT: And they want to have money from that account sent to --

MR. COHEN: a bank in Germany --

THE COURT: -- to pay for Mercedes products?

MR. COHEN: They need to send dollars.

THE COURT: It has to be in dollars.

MR. COHEN: So the SWIFT message gives instructions to the parties in this transaction what is supposed to happen. And it says, wire from this account from the Ministry of Science and Technology's account a million dollars to Deutsche Bank in Berlin for the benefit of Mercedes-Benz.

THE COURT: Why does that have to go through New York?

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MR. COHEN: Because dollar transactions will come through New York. They will convert the pesos to dollars. The dollars will then be sent to Europe. And they may even be converted to euros, for example, if they have to be. But if payment is in dollars, money center banks in New York are involved in the transaction.

THE COURT: So your theory is that you might get information which would form the basis for an application in Germany, for instance, of an attachment of a contractual right or something attachable under German law?

MR. COHEN: Or if we had found a transfer to Honeywell.

THE COURT: Let's forget Honeywell. Let's stick to Germany.

And you say there would be evidence at the Bank of America of such transfers?

MR. COHEN: Yes, your Honor. We have a good faith belief that that is the case. In fact, we think that has to be the case.

THE COURT: Let me ask you this. What you are talking about now are transfers that have occurred?

MR. COHEN: Yes.

THE COURT: I guess it is obvious, but I am going to ask you the obvious. Why is that helpful, because it is in the past?

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MR. COHEN: Because the contract may well not have been fulfilled, like the Honeywell situation.

THE COURT: Maybe there would be a down payment?

MR. COHEN: Exactly, your Honor, or there may be a series of payments and this is one of them.

THE COURT: How broad would this discovery order be as far as time? Is it something that would require compliance in the future or just --

MR. COHEN: Through the date of response.

THE COURT: As of the time of the order -- what is on record at the time of the order?

MR. COHEN: I think we go back two years and through the date –

THE COURT: But it would not be an order directed to supplying future information?

MR. COHEN: If we are successful in doing our forensic examination and can come back with good cause to show that we need more information, we might try that, but there is no request that it be

continuing, and that is true with respect to all of these subpoenas, your Honor.

THE COURT: Now, what you are seeking as far as BNA is everything on the books of BNA, whether it might be on the books of BNA in Argentina or wherever, right?

MR. COHEN: That's right. And your Honor, the reason why they give why they shouldn't have to do that is they claim

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that internal procedures don't allow for the transfer of information among the branches.

And I suggest, your Honor, that that is just not enough. This is a unitary bank. It has a branch in New York. It is subject to regulation by the U.S. banking commissioner. It is here for all purposes. The fact that it wants to put shutters around each of its branches, I think, is insufficient.

THE COURT: My memory is that it has long since been decided, say, for a bank like Citibank -- a bank, if you serve a branch, you can get information from the central office. That is pretty overall, isn't it?

MR. COHEN: Well, when you are talking about attachments, your Honor, I think we still have remnants of what we call bank branch rule in New York.

THE COURT: No. I am talking about information.

MR. COHEN: Discovery you can get, absolutely. Absolutely.

And I think that their response that their rules don't allow access to information --

THE COURT: I thought that their rules would not prevent a court order.

MR. COHEN: That's exactly right.

THE COURT: Let's hear the other side.

MR. BOCCUZZI: Good afternoon, your Honor.

Carmine Boccuzzi for the Republic of Argentina.

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I just wanted to speak to a point your Honor made in December when we were last here, which is your comment that this discovery is taking a shape wholly different from what we have seen before.

The problem with the three subpoenas is that they go beyond any clearinghouse concept or rule of reason that your Honor has imposed in the past and are a broad-based open-ended discovery mission -- as Mr. Cohen called it -- a forensic discovery. It is really a fishing expedition. And that is not proper.

He cited the Rubin case. It is important to note that the Rubin case itself which rejected the idea of this kind of overbroad discovery in a sovereign context said it was adopting the exact same message as the Second

Circuit, and for that they cited the EM case where, of course, the Second Circuit cited earlier Second Circuit precedent said that in this context, discovery has to be order circumspectly to verify allegations of specific facts crucial to immunity determination.

Here, we are hearing speculation about what might exist in Germany with no showing --

THE COURT: No. It is not so speculative now that we have seen the Honeywell transaction.

MR. BOCCUZZI: But, your Honor, that --

THE COURT: Just a minute.

MR. BOCCUZZI: Excuse me.

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THE COURT: If the entity had been a ministry, really had been part of the Republic and if there had been an attachment that was directed to the contractual rights of the ministry, I think that that attachment would have been valid -- at least it certainly is arguable.

So we are not really talking about a fishing expedition or a lot of unknowns. There is now a focus. And I think that at least what the Court realizes now is that the Republic, through various entities, can very well be engaged in commercial activities in various places or activity which might involve attachable assets on some other theory in a foreign country.

So please don't talk about fishing expeditions. What do you expect these people to do? They have to engage in these maneuvers because of your client's behavior. And these plaintiffs now have come forward with a very credible theory illustrated by the Honeywell situation that the Republic may be purchasing abroad, may be investing abroad, may be doing a lot of things outside of Argentina which could be the subject of attachments. That's their theory. It is not fishing.

And it may be that the terms of the subpoenas need to be or the terms of any order enforcing a subpoena -- it may be that there needs to be some more specificity, but it seems to me that the plaintiffs have a very good theory. And, of course, it is a lot of work. Of course, it involves trying to

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get information in a difficult way, but who is responsible for that? It is your client. This goes on year after year because of your client, and the difficulties are caused by your client. It is difficult.

I am going to grant the order. I am overruling the objections to these subpoenas and I will enforce them. I want to see specific orders drafted, and I want to let the parties comment on the specific orders, but not continue objecting. The objections are overruled.

MR. SULLIVAN: Your Honor, on behalf of BNA, could I be heard on that point?

THE COURT: Have you submitted papers?

MR. SULLIVAN: Yes, your Honor.

THE COURT: I think so.

MR. SULLIVAN: I am Mark Sullivan on behalf of BNA.

A couple of points that I would briefly like to address; one is with respect to the focus, and the other is with respect to the so-called lack of burden that would be placed on BNA.

With respect to the focus, the subpoenas here are addressed to any property maintained at BNA anywhere in the name of Argentina. Argentina is defined as 225 entities and individuals. So I would take issue with the fact that they are focused. In fact, these subpoenas are not focused and run afoul of the Foreign Sovereign Immunities Act in a very

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specific way, and that is that they are not sufficiently directed to locating assets that would be subject to execution under the FSIA.

THE COURT: You can see the problem, can't you?

MR. SULLIVAN: Certainly.

THE COURT: If there is a way to narrow the subpoenas to eliminate entities that, realistically, where there could be nothing productive gained, I certainly would like to do that. But the general idea, who do you think is causing the trouble here? These

plaintiffs are owed a lot of money on their judgments legally obtained in this court.

MR. SULLIVAN: Certainly, and we are very mindful --

THE COURT: If there is a problem, talk to the Republic. Talk to Cleary Gottlieb primarily. They are the cause of this.

MR. SULLIVAN: Your Honor, we certainly are mindful of that. Part of the problem from a nonparty perspective is that, by their own nomenclature, NML says that what they are looking for is information about Argentina's financial circulatory system. So they begin with that broad sweep. Reference is made to the Rubin case and that is a Seventh Circuit decision that says that under the FSIA, you cannot have a discovery, a general asset discovery.

THE COURT: I am not seeking to do that. I am not seeking to do that at all. What is being sought here is to see

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specifically if the Republic or parts of the Republic are engaged in commercial activities in the United States or other activities which under the law of Germany or France would lead to attachments.

And it appears that the plaintiffs are finding some receptivity in courts abroad in their effort to recover against a republic which won't comply with its legal

obligations. So these are developments that have changed the picture. So that's really the idea.

If there's a way to narrow the subpoena, to reduce the burden on the Bank of America in some way, I think that should be done. But in my view, the theory is very clear -- maybe it is still burdensome -- and if there can be a way to fashion a subpoena or a court order to carry out that theory more clearly and narrowly, that would be fine.

MR. SULLIVAN: Your Honor, in your introductory remarks here, you talked about there being no use of attachments in Argentina with respect to BNA -- I should be careful to specify. Information about accounts and documents in New York, that has all been provided. So we are only talking here about extraterritorial information.

THE COURT: What about Belgium?

MR. SULLIVAN: Sitting here, I am not sure whether BNA has any documents that relate to anything regarding Belgium.

THE COURT: You probably don't know. But we are not

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talking about things that would lead to possible attachments in Argentina, we are not, but certainly as something that might lead to an attachment in the United States or another country besides Argentina is fair game.

MR. SULLIVAN: Then I would agree, the extent that the discovery or the subpoena is specifically focused on an asset that is located within the United States that is used for a commercial purpose in the United States --

THE COURT: -- or a foreign country.

MR. SULLIVAN: In some instances that may be the case. But here when they are seeking such broad information about Argentina's circulatory system without any more definition than that, that puts a nonparty such as BNA at a disadvantage.

THE COURT: Here's what I would suggest. I don't have the language of the subpoenas before me and I am not trying to get into that detail, but if I am going to issue a basic ruling now, I would certainly expect counsel for NML and counsel for the three banks to work together in some reasonable narrowing. It may be these things are drafted too broadly. I am not trying to get into that detail this afternoon.

Yes, sir.

* * *

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MR. GLICKMAN: Your Honor, may I be heard on behalf of Bank of America?

THE COURT: Sure.

MR. GLICKMAN: Thank you, Judge.

Barry Glickman.

I don't take sides as to whether or not I am in here today because there was an overbroad subpoena served on us or because the Republic has not paid its debt. What I am in here for is to address the specifics of this subpoena.

THE COURT: Right.

MR. GLICKMAN: Whether or not the plaintiff is entitled to discovery, that is another discussion for another day or it has already been had. The problem is the subpoena that has been served.

I heard counsel represent to the Court today about how there is this desire for SWIFT transactions. The fact is, the subpoena that was served, the subpoena that is before the Court on the motion to compel and the motion to quash, that subpoena contains 12 separate and distinct categories. It contains requests for account information. It requests –

THE COURT: I will say to you what I said to the lawyer for BNA. I am not sitting here trying to edit the subpoena. I think that you are probably correct that it is too

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broad, and I think it should be changed, but I am not going to do that this afternoon. And I am going to rely on counsel to try to work out specific changes. And I am sure you won't resolve all of your problems and we will be back.

Simply, in principle, I am not going to quash the subpoenas as to BNA or the Bank of America with the understanding that those subpoenas need to be modified, but I can't get into that this afternoon.

MR. GLICKMAN: Judge, may I understand then that at least in the context of the subpoena that is before the Court, the motion is not decided in toto, that it is being held in abeyance and if we are unable to work out parameters, that we will be back here?

THE COURT: Of course. That is one way of saying it, sure.

* * *

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[THE COURT:]

And as far as the two other subpoenas, the BNA and Bank of America, the motions to quash are denied, subject to the need for counsel to negotiate a more specifically drawn subpoena in each case and subject to a possible application to the Court on the specifics of the subpoenas.

That concludes our day.

Thank you.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 CV 2507
03 CV 8845
05 CV 6200

New York, N.Y.
December 17, 2010
11:05 a.m.

EM Ltd., et al.,
Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

Before:

HON. THOMAS P. GRIESA

District Judge

APPEARANCES

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(In open court)

THE COURT: I hope that this meeting that we are having will cut down on the paperwork to some extent because there are lots of efforts before me now to get discovery and that is resisted.

Let me just list what I think are the motions that we have for today.

There is a motion by NML to compel Banco De La Nacion Argentina, or BNA, to produce documents in compliance with a June 14, 2010 subpoena. So that's one of the motions I have and which we are going to have argument on today.

* * *

[THE COURT:]

Then I have a motion by NML to compel compliance with a subpoena served on Bank of America. I think the date of that service was March 10, 2010. The subpoena served on Bank of America asks for information about the accounts of a number of so-called ministers and secretaries of the Republic and a group of independent entities. The Republic has moved to quash the subpoena. NML has moved to compel Bank of America to comply with the subpoena.

* * *

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THE COURT: I think I would like to start with the subpoena that was served March 10, 2010 on Bank of America, and I would like to hear from NML about the purpose of that

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subpoena.

MR. JACOB: Good morning.

Charles Jacob of Miller & Wrubel, representing NML.

The purpose of the March 10 subpoena is to take discovery of the flows of funds and accounts of various entities, both branches of government, government agencies and divisions and the individuals who run those divisions -- although we have negotiated that separately with counsel -- to ascertain how it is that the Republic of Argentina, which we believe is a

corrupt and cynical organization evading its obligations by using these entities and individuals, is managing its governmental operations.

And the subpoena will accomplish that, first, by the identification of accounts, but more importantly, by using what are known as SWIFT messages. And SWIFT messages are international fund transfers, or they are the documentation of international funds transfers that go through money center banks such as Bank of America in New York such that if money is being wire transferred from a government agency in Argentina to anywhere else in the world, if it involves U.S. dollars -- as it often does -- it will go through New York through a money center bank such as Bank of America and be memorialized in the SWIFT messages.

THE COURT: I don't hear anything in what you have described that would delineate property subject to process.

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MR. JACOB: It would, your Honor.

THE COURT: How?

MR. JACOB: Let me give an example.

THE COURT: What I have in mind is property used for commercial purposes. As far as I know, that's all you can get.

MR. JACOB: But there are many commercial purposes that this would identify, and there is an

example in our motion papers where Argentina, through one of its agencies, wires money to Germany to purchase equipment, let's say, and it is a commercial purpose.

THE COURT: What kind of equipment for what purpose?

MR. JACOB: A commercial activity.

THE COURT: What commercial activity?

MR. JACOB: The government's activities, whatever they might be, your Honor, so that if they are going to use equipment, let's say, to operate radio towers or other commerce, it would be commercial activity.

Let me be clear, it doesn't have to be commercial activity in the United States. I think that's where Argentina is taking an incorrect position. Under Rafidain these can be assets wherever located, so if we find assets in another country about to be purchased, the title has transferred to Argentina, we can attach those assets. It may not be in this court. It may be in a proceeding in Europe.

THE COURT: Let's back up a bit because the law about

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what is commercial activity is not simple. And I have in mind, I think that provision actually in the statute and certainly in case law, that the nature of the activity

controls, regardless of the purpose. There is some law to that effect.

Let's suppose -- and I imagine this is the case -- the Republic rents or occupies certain quarters for a UN mission. The UN mission is not commercial activity, right?

MR. JACOB: That might not be, your Honor.

THE COURT: Just as far as I said, the UN mission is not commercial activity.

Let's suppose that the Republic purchases in New York supplies for the UN mission and money is somehow found on its way to pay for supplies -- stationery, light bulbs, cleaning materials, whatever. Money, let's suppose, somehow is found deposited in a bank. And the facts are clear that the purpose of that money is to purchase supplies for the UN mission, no other purpose. It is not being invested. It is simply there to do that. Would having that deposit there be commercial activity?

MR. JACOB: No, but with respect --

THE COURT: You said no. Just answer my question. The answer is no, right?

MR. JACOB: Correct.

THE COURT: Now, obviously, a government can engage in personal commercial activity. They can invest. And I dealt

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with that in the BCRA opinion. If the Republic or its alter ego invests, that's commercial activity, generally speaking. A government can go into business. The Republic of Argentina might go into the beef business or the copper business or the oil business. There are a lot of ways that a government can engage in commercial activity, right?

MR. JACOB: Yes.

THE COURT: Now, one reason I had this hearing is, this litigation didn't start in October of this year. We have had it going for a long, long time. And we have had a lot of discussion about possibilities of commercial activity.

One reason I called you all in today is that, I will start by saying, I surely don't remember the entire record of everything that has gone on in this litigation all of these years, but I do believe there has been effort -- if there hasn't been, I would be astounded -- to discover whether the Republic is engaged in commercial activity.

MR. JACOB: Correct.

THE COURT: Maybe we have talked about some of the obvious forms, have they been in the beef business or something like that. And the thing is, I have not been informed that the Republic is engaged in commercial activity with an exception which I found in the BCRA alter ego case where I found that the Republic through the BCRA had invested here. That is

commercial activity -- at least I found that and that is a

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subject on appeal.

But I haven't been informed, and here we have all of this effort to have the Bank of America and various parties producing all this information. And I really have to understand that there is something at the end of the line that would be aided by all of this discovery.

MR. COHEN: Your Honor, may I?

It is Robert Cohen from Dechert, on behalf of NML.

Mr. Jacob has handled the Bank of America subpoena because of a conflict that my firm has, but maybe it would be useful for me to describe to you what our overall approach is with respect to these third party subpoenas and why now.

Your Honor has focused on the question of whether we are going to be able to establish some commercial activity in the U.S. that would allow us to attach assets in the U.S. We have done that for seven years through attempts to get discovery from Argentina. That really has gone almost nowhere.

We are now at the phase of this litigation, your Honor, where we need to understand the financial circulatory system of Argentina. This is a debtor that owes our client over $2 billion. We want to embark, with the help of this Court, on a forensic investigation

of what it does with its money. Where does it have bank accounts overseas, not necessarily in the U.S.? And your Honor has said numerous times that this Court can compel Argentina and parties over

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which it has jurisdiction --

THE COURT: I want to interrupt you.

I am sure that you are going farther, but as far as you have gone, to me -- what does the Republic do with its money?

MR. COHEN: Let me give you an example. I know that's at the core of your question.

THE COURT: I don't see where that goes, except we know that the Republic probably has a lot of governmental activities.

MR. COHEN: If Argentina buys trucks or heavy equipment to build roads and it buys that from Germany, from Mercedes-Benz and it pays for those trucks, if we find out about it in time, that is a commercial activity. And the German law may not be exactly the same as ours, but let's assume it is and it is a commercial activity, and buying trucks in Germany is a commercial activity because anybody can do it. We could attach those trucks in Germany and sell them for their value. They buy cell phone towers someplace as part of the ministry of telecommunications to provide telecommunications services, a private activity.

If we can identify where in the world they are buying those commodities -- liquified natural gas, your Honor, we were before you not too long ago seeking to attach a shipment of liquified natural gas, a commercial activity.

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If we can find where that activity is being conducted and it is someplace outside of this court, outside of the U.S., we will be there. We have actions in France seeking to attach assets there; actions in Belgium, seeking to assets there; actions in Switzerland, seeking to attach assets there.

What we are trying to do through all of this discovery is to understand what Argentina is doing as a business, where does it buy things, where does it sell things as a business. And that's why we need your help, your Honor.

THE COURT: Look, I started with the example of the UN mission, and I asked if supplies were bought for the UN mission, if that would be a commercial activity or a governmental activity, and Mr. Jacob conceded it would be a governmental activity. Obviously, the purchase of stationery or cleaning materials, it is, in a sense, a commercial transaction. Somebody goes to a vendor in New York, presumably, and makes a purchase, and it is not firing a cannon or something, it is a purchase.

Now, I think I have in mind the law that the nature of the activity controls and the purpose is not to be considered -- I don't know that I am quoting it right,

but you know what I am talking about. I think that that concept -- I doubt very much if it can be carried to an extent which would allow the attachment and process on things that you talk about.

In other words, if the government of Argentina is

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building roads, that's the government doing something as a government. Now, if they purchase trucks to build the roads, if they purchase the cement or the asphalt, etc., well, they will, presumably, go to a vendor of trucks -- Mercedes, perhaps or whatever -- a vendor of asphalt, a vendor of cement. I don't know that you would buy cement in a foreign country, but you know what I am talking about just for illustrative purposes. If they are making these purchases to meet the necessities of this governmental activity, what rule of law or what theory of law or what says that those purchases are commercial activity?

MR. COHEN: Your Honor, if we were in this court attempting to enforce an attachment against those trucks, the analysis that you have described is what we would need to go through. What we are talking about here, your Honor, is pure discovery.

THE COURT: No. Wait a minute. We are talking about discovery which has to have an objective that is worth pursuing.

Let me go back because I may not have understood you, but you voiced a theory about purchasing trucks in

Germany from Mercedes, now what is it that you believe you would have a right to attach or execute on?

MR. COHEN: If they were paid for in Germany, your Honor, I believe that I would be able to take the trucks that

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would be then deliverable to Argentina.

THE COURT: On what theory would you be able to do that?

MR. COHEN: Because it was property of Argentina in Germany, fully paid for, and now I have found an asset of Argentina's. My judgment is now registered in Germany, we are assuming, and I am seeking to enforce it. I found an asset -- trucks paid for and owned by Argentina -- I seize them and sell them to satisfy my judgment. And the law of Germany will decide whether that property is used for the commercial activity or whatever the equivalent statute is in Germany.

In France, your Honor, we have attached property that your Honor would find to be diplomatic, and the law there is different than the law here. The law there is considering what the breadth of the waiver of immunity means under French law because the waiver says, to the full extent permitted by law. And that means here, the Foreign Sovereign Immunities Act. In France, it means their equivalent. And there is a strong argument in France that a sovereign can actually waive immunity over its diplomatic property if it says it is appropriate. We may be able to take that property.

That is being appealed in the courts of France right now.

So the question is, what is the law in the place where we find the asset. And the issue for this Court is, are you going to let us find where those assets are through this

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discovery. And it doesn't really matter whether, ultimately, we could seize that property in this court; it is whether the scope of discovery is appropriate, given the issues in this case; how much is involved; the burdens involved on the third parties we are asking for information from within your jurisdiction. Can we make the burden sustainable? Can we help pay for the costs?

But we should have this information, Judge, so that we can find out what our debtor is doing around the world. It shouldn't be able to hide behind the Foreign Sovereign Immunities Act commercial activity exception, because that may not be what applies when we get the information and seek to enforce it.

And that is the common thread through this third party discovery, how are we going to find out what Argentina is doing and where. The time has come for them to let us have that information. And we are willing to work with all of these third parties to minimize the burden.

* * *

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[MR. COHEN:]

And, your Honor, under Rafidain and other cases, you have the authority under Rule 69 and Rule 26 to give us broad discovery in enforcement of our judgment, and it is not limited to assets in this jurisdiction.

THE COURT: I am aware. I think a long time ago -- nobody went up to the Court of Appeals about this -- I really

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said, as far as discovery, this Court should be the clearinghouse.

MR. COHEN: Exactly.

THE COURT: And we have operated on that.

My only problem is that I really think that now the discovery is taking a shape that it has not taken before, and you are so stating and you are explaining why. And you are also explaining that you are seeking information about assets located in foreign countries so that you might take advantage of the law of foreign countries which might be different from United States law, the Foreign Sovereign Immunities Act.

So that is your position?

MR. COHEN: Yes, your Honor.

MR. BOCCUZZI: Your Honor, Carmine Boccuzzi from Cleary Gottlieb, for the Republic.

Getting to the concept of extraterritorial discovery, you are right, your Honor. You said that you wanted to act as a clearinghouse, and a common thread through all of your comments has always been there has to be a rule of reason applied.

And just talking about the Bank of America subpoena, that kind of hearkens back to the type of discovery that was served by plaintiffs early on in these actions which your Honor rejected because it was very, very broad, overbroad. For example, the Bank of America subpoena defined Argentina to

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include and lists out 148 ministries and secretariats, 136 individually named ministers and other individuals, and 43 juridically separate entities and asked for all sorts of account information, wire transfer information about all of these. And that just doesn't comport with the rule of reason that your Honor stressed throughout these proceedings, putting aside our ongoing objection to extraterritorial.

I would also add, it is all in the context of several dimensions of hypotheticals. Mr. Cohen said that he might have a judgment entered in Germany one day, and the law of Germany might allow him to attach some asset over there that remains unidentified.

And I would just point out that we are getting information about the law of some of the European

jurisdictions. For example, in France, NML's arguments about the scope of the waiver have been rejected. So even though they have lost and they cannot attach this diplomatic property, they somehow say that they should get discovery here.

THE COURT: I thought it was still pending.

MR. BOCCUZZI: It is on appeal, but to date the courts have ruled on our side, on the Republic's side as to the scope and proper construction of the waiver.

* * *

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[MR. BOCCUZZI:]

If we are looking at the picture of to what end, these theories don't hold up in European courts. So we are left with, just take it back to BNA, is a massive subpoena sort of very broad ranging, very undefined, addressed to individuals who are not in any measure liable for the debts of the Republic of Argentina, private individuals, ministers, separate entities. And that doesn't comport with the rule of reason.

Liquified natural gas was mentioned. They came in. They sought to attach it. They got discovery in that context. There were some documents. There was even a deposition. Facts came in, and your Honor denied that attempt to attach those assets. They didn't appeal that. It was a completely correct ruling. So there it was driven by a specific instance, but this is sort of blunderbuss, broad-ranging discovery that doesn't

stand up to the rule of reason that your Honor has asked that the parties follow.

THE COURT: I could go back to NML, and I will talk with either lawyer, but I don't quite understand how the subpoena would be even focused on what Mr. Cohen talks about.

MR. JACOB: May I explain, your Honor?

THE COURT: Yes.

MR. JACOB: What Mr. Cohen talked about was the lifeblood, if you will, the form of circulation of funds by which the Republic operates. And we know that it does so

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through ministries and ministers. And the SWIFT transfers in particular are the circulatory system of the funds of Argentina, and the SWIFT messages are extremely informative because you can see the sender, you can see the recipient and you can often see the purpose of the transaction.

We are not required to establish at this time that any particular agency is or is not an alter ego. What we have shown, which is sufficient, is that these agencies and these individuals might have information subject to discovery.

And the number of entities that Mr. Boccuzzi cited is not at all daunting because all of these banks, including Bank of America -- and we have documented

this very thoroughly in the record and it is not disputed -- are required to use an automated system known as either the SDN system or the OFAC system, where this could be done in an automated manner. It is not a huge burden at all. They have thousands of entities on the OFAC system already, and adding a couple hundred more is not a big effort for them.

THE COURT: I don't know whether it is big or not big, but let me just say that I have no picture at all of what a country such as the Republic of Argentina might be sending or receiving messages about of a financial nature. I don't have any picture at all. Maybe the papers illuminated more than I have absorbed, but if this were the Argentine Steel Corporation, I would assume that the communications back and

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forth to foreign countries or whatever would be about the steel business.

MR. COHEN: Can I give you an example, your Honor?

THE COURT: Just a minute.

But here you have a government. There is interesting news about the government, about some problems with the government and all, but it is a functioning government of a sizable and important country. And I am sitting here thinking that I really don't know what they would be communicating about in the way of finance.

MR. COHEN: Give you an example, your Honor?

THE COURT: Yes. But I have to assume that it would be mainly about the functions of the government. It is not the Argentine Steel Corporation. This is the Republic of Argentina.

MR. COHEN: Your Honor, in the United States, networks like CBS engage in contracts to use satellites, to beam down signals to the people who want to watch CBS and that is a private enterprise here, leasing satellite capacity.

In Argentina they have a ministry called Arsat that does that function. It engages in contracts with U.S. satellite providers for the right to beam signals off of their satellites to Argentina where they then sell it to commercial users. We have gotten discovery from those satellite providers about the Arsat relationship. Payments to the satellite

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provider is money that flowed out of Argentina to accounts in the U.S. We would argue if we had to litigate it here, commercial activity just like any other. And that is money coming of Argentina to the U.S. If we have a SWIFT communication, which is what we are seeking, that said from the ministry of telecommunications to SES Americom in Princeton, New Jersey for payment of satellite leasing capacity, we would be able to trace that relationship. We would know that they are engaging in that kind of conduct in the U.S.

What would we take? Well, if the contract had value, in other words, if there was a term left in that contract and it was a commercial activity, we might be able to step into the shoes of Arsat, sell their rights to use the capacity for more than they are paying for it and provide the proceeds to our judgment. That is a real life example, but it is just one example.

THE COURT: Is there an Argentine entity that owns the satellites?

MR. COHEN: No. It is a U.S. administered entity that owns the satellite.

THE COURT: What is the role of the Republic?

MR. COHEN: The Republic leases capacity on that satellite, that is, a transponder on that satellite is leased by Argentina to allow it to beam up signal and then broadcast it down over Argentina. And then they sublicense the right in

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Argentina to station CBS-equivalent in Argentina to have their signal --

THE COURT: So they are leasing capacity on a satellite?

MR. COHEN: That's right.

THE COURT: But they don't own the satellite?

MR. COHEN: They don't own the satellite. They just have a contract with the satellite capacity provider.

THE COURT: The thing is, what you have said, I never heard of this before today. Maybe it is in some papers but, forgive me, I just have not read every paper, but I haven't heard of this -- and I am not going to rule -- but it seems to me, arguably, that would be commercial activity.

Again, are there any other examples of that kind of thing? For instance, if there is something that is at least arguably a commercial activity, then there is. But it certainly doesn't mean, in my view, that everything that the Argentine government does on the subject of finance is of that nature.

I am aware that foreign countries may not place the emphasis on commercial activity that United States law does. You have made that point and I have heard it and I recognize it. Still, I would really not want to have the Bank of America or anybody else producing a lot of discovery material about financial communications when there is no affirmative

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indication that such communications or some segment of those communications would really relate to something attachable.

It is conceivable that a foreign country would allow an embassy to be attached. It is conceivable that a foreign country would allow a naval ship to be

attached, if it was visiting, but I really would not feel that I should allow a lot of discovery about the financing of embassies or of naval ships unless I had some indication that somewhere this would really be recognized as something that would involve an attachable asset, because I would be surprised if France or Germany or England or anybody else over there would allow the attachment of strictly government property. Maybe they would, but I wouldn't want to just start and say, well, maybe it could be done and, therefore, there should be all of this discovery. I just cannot go that route. There has to be some reasonable narrowing of this, even if you get something.

MR. COHEN: And we were working with Bank of America to try to find ways to reduce the burden. We had agreed to give up the names of the individuals, for example, your Honor. Lots of things were in the works before the motion to quash came.

But the reality is, governments buy things. They buy computers. They buy all sorts of things around the world. They really do. These are commercial transactions that governmental ministries engage in all of the time. The paper

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example is true, but it is probably not worth pursuing, but if we can find significant contracts to buy goods, which is what governments do -- they do things beyond the diplomatic realm. They buy food for hospitals. They do all sorts of things around the world.

This is a very time-consuming and forensic exercise that we are willing to engage in, but the information will be there. It is almost per se going to be there. They have to buy these things and they are not available in Argentina. We are willing to take the time and effort and money to find this stuff. We are willing to exclude ministers in the first round in the case it is going to lead to too many false hits or be embarrassing, with the exception of the President and her late husband, which is something we have re-introduced into the search, your Honor.

This is not a false errand here. We are not going to embark on this because we think that we are not going to find assets around the world, that can be attached. They are absolutely buying commodities, goods, hard products, computers and other things all over the world. And it is not money going to pay diplomatic employees in the various jurisdictions.

THE COURT: What is it to be used for? You are talking about them making purchases, and I am sure they do.

MR. COHEN: Yes, they do.

THE COURT: In a general way, what is your concept of

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the reason for these purchases? You used a highway building.

MR. COHEN: The purchase of a truck is a commercial activity under our law because you look at the activity and not the ultimate purpose. Is it something that other than governments engage in, or only governments engage in? The purchase of trucks, just like the purchase of boots for the army is a commercial activity, even though soldiers are going to wear them. That is the quintessential example in the legislative history of the FSIA. The purchase of boots is a commercial activity, when they are going to be used for the army; the same thing for trucks to build roads, that is a commercial activity.

THE COURT: The boots, I don't remember all of this, but that was part of an example given in the legislative history.

MR. COHEN: Yes, your Honor.

THE COURT: Commercial activity?

MR. COHEN: Yes, your Honor.

This exercise is one that will take time. We have experts engaged who are prepared to do it, and it will absolutely produce fruitful opportunities, maybe not here, but somewhere around the world. But at this point in this litigation where there is so much at stake, some burden on third parties and Argentina is absolutely appropriate, your Honor.

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MR. GLICKMAN: Judge, may I be heard?

THE COURT: Yes. Your name, sir?

MR. GLICKMAN: Barry Glickman, on behalf of Bank of America NA.

I just wanted to very briefly address several points that NML's various counsel have brought up, and this is really limited to our little corner of the universe as being the entity upon which the subpoena was served and the entity that would have to sustain the burden.

First of all, there have been several representations made that are simply not true, and that is, the nature of the activities that the bank would have to endure in responding.

I heard some references to OFAC and SDN platforms. All that means, and I give this as the ultimate example, if the government were to make an effort to track down wire transfers in which Osama bin Laden was involved, the name would be placed in a computer platform. Going forward, each time a transaction involving Osama bin Laden was interdicted, it would be kicked out of the system and it would be subject to review.

But by no means is what counsel is suggesting an automated procedure. Let's just pop the names in there. If you pop the names in there, that's going forward. And if what they are suggesting as well is, let's just pop the names of these hundreds of entities in there, how long would it take a computer operator to sit down and type it in? Again, that is

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not the answer either.

As the record will reflect in a submission from a bank representative which indicates, there are tens of thousands of potential hits and each one of these couldn't just be turned over blindly; they would have to be reviewed because there is certainly a possibility that they have nothing to do with anything.

I think this Court should further understand that if there is a SWIFT message -- and, by the way, a SWIFT message is just fancy terminology for a wire transfer -- the entity that is the subject could be the sender, could be the beneficiary, could be an intermediary, what have you. We don't really know. A human being on behalf of the bank would have to review each of these. This is just one little corner of the subpoena.

The other thing, Judge, is we are in here in the context of judgment enforcement, Rule 69. And Rule 69 specifically speaks to state law.

THE COURT: Speaks to what?

MR. GLICKMAN: State law, in the context of enforcing a judgment. It is not just a garden variety Rule 45 or Rule 26 discovery device. Rule 69 specifically speaks to state law unless there is federal law that would supersede it.

In the context of state law, in the smallest civil court claims case, what have you, a judgment creditor

has to have a reasonable basis that the process that is being served

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on the third party is that it is reasonable that this third party is going to have information that is relevant to the satisfaction of the judgment.

In the context of that, we have heard counsel tell us today that what they are really trying to do is to get a grasp on the financial circulatory system of Argentina, what does the Republic do with its money, alternatively, how are we going to find out what Argentina is doing and where?

This really isn't designed to identify property of or debts owed to the government. What it is really seeking to do is to say, OK, if we can't find anything in the States, but we see a wire transfer to some foreign nation, maybe we will go to that foreign nation and start a lawsuit in an effort to attach something over there, which takes us full circle to, we have to go elsewhere to take discovery. And if they were to come to the States under 28, U.S.C., 1782 and start looking for discovery, they couldn't start coming to the States to take discovery of transactions that occurred elsewhere.

And the only nexus, we are assuming, for the service on Bank of America is that Bank of America was perhaps an intermediary. We are not even talking about Bank of America as these target entities' bank. There could have been a wire transfer from Germany to Japan via New York through an intermediary --

through a corresponding bank account maintained at Bank of America as an intermediary. So the burden obviously

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is there, there are tens of thousands that we have identified already.

THE COURT: What do you mean you have identified already?

MR. GLICKMAN: Just in a preliminary review of the names that were included in the subpoena in the affidavit shows the numbers of hits for transfers --

MR. BOCCUZZI: -- because some of the names are common Spanish names, there are many false positives.

MR. GLICKMAN: Right. I think it is also very important to understand in the context of what we are looking for here, we are not talking about property of or debts owed to but really --

THE COURT: You are not talking about property what?

MR. GLICKMAN: Property of or debts owed to -- I can't even say judgment debtor because, again, we are now expanding the term "Argentina" to include these hundreds of other entities or ministries, what have you.

Really, you know, what I am hearing is, I think it is admittedly a fishing expedition. We have no idea what you have, but let's just take discovery of the third party financial institution and see what that can lead us to and then let's go to the next step and the next step and the next step.

And Your Honor said earlier today, I've got to see something at the end of the line. And the problem is, what I

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am hearing is, there are various nodes, and they want Bank of America to be, effectively, a collection agent. And the only thing that we have been told so far in the context of burden is, don't worry about it, we will pay for it. We will pay you for the time invested by your personnel. But the reality of it is, I am an attorney. I have to sit down at my desk and work on my files. If somebody offers to pay me for it, that is very nice, but I don't have time to work on my files if I am working on something else.

THE COURT: Let me say this. I take very seriously what you have said, but I am going to say something which I have said many, many times. The reasons that we are involved in these strained attempts to get assets is that a very simple thing isn't being done, that is, to pay on the bond, pay the judgments. And what goes on year after year are attempts to get, in the most difficult ways, what the Republic should be paying.

So I take very seriously what you said, and what I am saying now does not take away from that. But when

you stand up and say what difficulties, the difficulties are really caused by the Republic of Argentina, and that's it. Really, they are not caused by these plaintiffs. They are not caused by the Bank of America. They are caused by the Republic. The Republic gave all kinds of assurances in the original bonds and the original instruments of how they would submit to

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jurisdiction and they gave assurance that the judgments would be honored. All of that was basically fraud.

They have not done it. They won't do it. They have got the money to do it, but they have arbitrarily and contemptibly refused to do what they are legally obligated to do, so I am very, very sorry if various entities are put to a lot of trouble, but you could maybe write a letter to the Republic and say, why don't you put us out of this trouble.

And this is going to go on, and it has gone on. I have sat through hearing after hearing. I have written decisions. How many times has this litigation been up in the Court of Appeals itself? A lot.

So a lot of you, the Republic is your client, to some extent. Why don't you tell your client something about their legal obligation? You are making money off of the Republic, various entities and have the Republic or related entities as their clients, well, fine. And I am not saying you shouldn't do business with the Republic, but you are doing business with an entity which is defying the law of the United States basically, not the Foreign

Sovereign Immunities law, but the law that says a judgment debtor should pay the judgment.

So I take very seriously what you say, but maybe you would like to write a letter to the Republic telling them to do their duty.

Now, what is presented by all of these discovery

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requests is quite difficult. There is a legitimate objective in trying to find out if there are assets which can be attached or executed on in order to provide payment of justly obtained judgments -- judgments of this Court which are being flaunted by the Republic.

Now, everybody who has participated knows that there are certain limits, to say the least, as far as where I will permit discovery and all kinds of things because there are laws here. And no matter how I believe in the misconduct of the Republic, the Republic, through its lawyers has a right to take advantage of U.S. law, even though it may shield the Republic from doing what the Republic is legally obligated to do.

I am not prepared to quash the subpoenas that have been issued. I haven't heard of every issue sitting here, and I haven't heard a lot about BIS and so forth, but I am not going to give a blanket order of enforcement for the subpoenas, nor am I going to give a blanket turndown to those subpoenas.

I will confess, I don't have a great deal of knowledge about the financial communications that are the basic

subject of these subpoenas; but there must be some way to narrow the subject matter, I think. And just about anything I say could be wrong because I am not at these banks. I don't really know what they have or don't have. I really don't know that. But I believe that if I enforced the subpoena against the Bank of America as to what it demands on its face, I believe that

[p.34]

enforcement would dredge up a great deal of material of no use to the plaintiffs.

The Republic of Argentina is a government, and I have to assume that most of its activities, including communications about finances, relate to governmental matters. And I am afraid to say that the example in the legislative history about buying boots for the army, I am not sure how far the courts would carry it. I will be frank to say that if I had evidence of money on deposit in New York to buy munitions for the Argentine army, I would not say that that is commercial activity. I could be wrong. I am, to some extent, voicing a view that is contrary to part of the legislative history. The legislative history does not ultimately decide everything.

So Mr. Cohen made certainly a reasonable argument that the purchase of supplies with the Argentine government might produce attachable assets, either in the United States or in foreign countries. He could be absolutely right on the law, but sitting here as a district judge, I have to say that, without some further submission to indicate the legitimacy of that, I just cannot agree.

I do not believe that, ultimately, United States courts will say that money which is clearly earmarked for the purchase of supplies or equipment for governmental purposes, I cannot believe that our courts will ultimately consider that to be commercial activity, despite the fact that a commercial type

[p.35]

transaction is engaged in, namely, a purchase and so forth. Whether a foreign country -- what view a foreign country would take, I would need to have some indication about what a foreign country would do with that proposition before I unleashed a lot of discovery to determine whether the Republic of Argentina is engaged in purchasing transactions in countries that would produce attachable assets.

What I am trying to say is, I would like to adjourn this and ask the plaintiffs to try to define their request in terms that take into account the problems I have raised. Your mention of the satellite was very interesting. I would like to see if the plaintiffs could, in some reasonable scope without getting into an enormous amount of paperwork, respond to what I have talked about and, obviously, the other parties can answer. Now, I don't want you to all come in here and have a big gap of what we covered.

* * *

[p.50]

THE COURT: Any briefing that needs to be completed should be completed.

Thank you all very much.

We are adjourned.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos: 11-4065 (Lead)
11-4077 (Con), 11-4082 (Con)
11-4100 (Con), 11-4102 (Con)
11-4117 (Con), 11-4118 (Con)
11-4133 (Con), 11-4153 (Con)
11-4165 (Con), 11-4182 (Con)

[Filed October 10, 2012]

EM Ltd.,
Plaintiff,

NML Capital, Ltd.,
Plaintiff - Appellee,

v.

The Republic of Argentina,
Defendant - Appellant,

Administracion Nacional de Seguridad Social, Union de Administradoras de Fondos De Jubilaciones Y Pensiones, Arauca Bit AFJP S.A.Consolidar AFJP S.A., Futura AFJP S.A., Maxima AFJP S.A., Met AFJP S.A., Origenes AFJP S.A., Profesion Auge AFJP S.A,
Defendants,

Bank of America, N.A.,
Intervenor.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of October, two thousand twelve,

ORDER

Appellant, The Republic of Argentina, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX F

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign

state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a

private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from

execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign

state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

* * *

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 11 2013
OFFICE OF THE CLERK

No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent NML Capital, Ltd. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent NML Capital, Ltd. respectfully submits that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 695 F.3d 201. The order of the district court compelling discovery (Pet. App. 21-22) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing en banc was denied on October 10, 2012. *See* Pet. App. 87-88. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Foreign Sovereign Immunities Act of 1976 ("FSIA") provides foreign states with two primary forms of immunity: jurisdictional immunity from suit, 28 U.S.C. § 1604, and non-jurisdictional immunity from post-judgment attachment and execution, *id.* § 1609. The Republic of Argentina asserts that, in cases where a foreign state's immunity from suit has been overcome, the courts of appeals disagree on whether (or to what extent) post-judgment discovery from the foreign state is limited by attachment immunity under the FSIA. This case, however, does not present that question.

The Second Circuit affirmed an order directing two third-party commercial banks to comply with subpoenas seeking information about Argentina's assets. Those banks are not foreign states, and there-

fore they have no claim to immunity—from discovery or otherwise—under the FSIA. The only question presented by this case is whether the FSIA's attachment immunity limits the scope of discovery in aid of execution that a judgment creditor may obtain from a non-sovereign third party. There is no circuit split on that question.

1. Congress enacted the FSIA to provide a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The statute embraced a "restrictive theory of sovereign immunity" that displaced the practice of "generally grant[ing] foreign sovereigns complete immunity from suit in the courts of this country." *Id.* at 486, 488.

Under Section 1604 of the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." 28 U.S.C. § 1604; *see also id.* § 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Among other exceptions, the FSIA includes a waiver provision: "A foreign state shall not be immune from the jurisdiction of courts of the United States" where "the foreign state has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1). If that provision—or any other exception to immunity from suit—applies, then "a federal district court may exercise subject-matter jurisdiction," *Verlinden*, 461 U.S. at 489, and (except for punitive damages) "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606.

Separate provisions of the FSIA govern post-judgment attachment and execution. Section 1609 provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609. Section 1610, in turn, provides several exceptions to attachment immunity, including exceptions for property used for a commercial activity in the United States when the foreign state has waived attachment immunity or the property was used for the commercial activity on which the claim is based. *See id.* § 1610(a)(1)-(2).

By their terms, neither Section 1609 nor Section 1610 extends attachment immunity to property outside the United States. Instead, the immunity from attachment (if any) of such assets is a question of foreign law, to be decided by foreign tribunals. *See, e.g.*, *NML Capital Ltd.* v. *Bank for Int'l Settlements*, Bundesgericht [BGer] [Federal Supreme Court] July 12, 2010, No. 5A_360/2010 (Switz.) (C.A. J.A. 862-93) (applying Swiss law).

Although Sections 1609 and 1610 define in detail the contours of the attachment immunity conferred by the FSIA, those provisions say nothing about discovery. The only provision of the FSIA addressing discovery simply permits stays in some cases involving terrorism where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g). Otherwise, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011); *see also, e.g.*, H.R. Rep. No. 94-1487, at 23

(1976) (noting that the FSIA "does not attempt to deal with questions of discovery"), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

The federal courts' "normal discovery apparatus" (*FG Hemisphere*, 637 F.3d at 378) provides for "broad post-judgment discovery" to aid parties seeking to execute on judgments in their favor. Pet. App. 13. Federal Rule of Civil Procedure 69(a)(2) provides that, "[i]n aid of . . . judgment or execution, [a] judgment creditor . . . may obtain discovery from *any* person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2) (emphasis added). And New York law (applicable here) similarly provides that a "judgment creditor may compel disclosure of *all* matter relevant to the satisfaction of the judgment." N.Y. C.P.L.R. § 5223 (emphasis added).

2. Argentina "has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what . . . might [be] term[ed] a diplomacy of default." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). Its latest contribution began in December 2001, when it violated its agreements with creditors by declaring a moratorium on payments on its external debt. Pet. App. 3. That default was then the largest sovereign debt default in history. *See, e.g.*, Sophie Arie & Andrew Cave, *Argentina Makes Biggest Debt Default in History*, Telegraph, Dec. 24, 2001.

In 2004, Argentina announced a debt restructuring plan, on a take-it-or-leave-it basis, that provided bondholders with a recovery of only 25 to 29 cents on the dollar. *See* Hal S. Scott, *Sovereign Debt Default:*

Cry for the United States, Not Argentina 3-4 (Wash. Legal Found., Working Paper No. 140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf; *see also* Larry Rohter, *Argentina Announces Deal on Its Debt Default*, N.Y. Times, Mar. 4, 2005, at C3. Argentina imposed that 71 to 75 cent "haircut" even though it was able to pay more. *See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 321 (2005).

Since Argentina's 2001 default, its economic fortunes have improved greatly. *See, e.g.*, *Argentina Says Can Rebuild Reserves Used to Pay Debt*, Reuters, Mar. 7, 2012. It has enjoyed consistent and substantial fiscal and balance-of-payments surpluses as a result of high prices for its agricultural exports, and now sits on more than $40 billion in monetary reserves.

Despite its financial success, however, Argentina "has not acted honestly and in good faith" to make good on its debts, *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010), and has instead engaged in a pattern of "willful defiance" of its legal obligations, *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011) (internal quotation marks omitted). While it "irrevocably agreed not to claim" sovereign immunity against its creditors and consented "to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment," Pet. App. 4 n.1, it has continued to assert sovereign immunity as a defense. And to evade its creditors, Argentina has spirited assets outside the United States and structured its finances to avoid attachment under the FSIA or the laws of foreign ju-

risdictions. *See The Government Is Protecting Itself from Attachment*, La Nación, Feb. 5, 2004 (C.A. J.A. 988-92).

3. NML Capital, Ltd. owns beneficial interests in bonds on which Argentina defaulted in 2001. NML brought eleven actions in the United States District Court for the Southern District of New York based on those bonds. The district court possessed jurisdiction because Argentina broadly waived its jurisdictional immunity from suit in the bond agreements. *See* Pet. App. 4 & n.1. The court entered five money judgments in NML's favor, totaling (with interest) more than $1.6 billion. *Id.* at 4. The district court also granted summary judgment to NML as to principal in six other actions in which NML's claims total (again with interest) more than $900 million. *See ibid.* Although "Argentina does not dispute . . . that the judgments against it are valid and enforceable," *id.* at 18, it has not paid these amounts, *see id.* at 4.

a. Since 2003, in an effort to execute on its judgments, NML has pursued discovery regarding Argentina's assets. Pet. App. 4-5. As part of that discovery, NML served subpoenas in 2010 on two non-sovereign commercial banks conducting business in New York: Bank of America and Banco de la Nación Argentina ("BNA"). *Id.* at 5. Through those subpoenas, NML sought to "learn how Argentina moves its assets through New York and around the world" and to "identify the places and times when those assets might be subject to attachment and execution." *Ibid.* (internal quotation marks omitted).

NML's subpoena to Bank of America sought information about accounts maintained by or on behalf of Argentina, including account balances, closures, and transaction histories. Pet. App. 5-6. Because

Argentina has evaded judgment enforcement efforts by holding assets in the name of entities affiliated with it, the subpoena defines "Argentina" to include Argentina's agencies, ministries, instrumentalities, political subdivisions, employees, and others acting on its behalf. *See id.* at 6.

The Bank of America subpoena also sought information about electronic fund transfers sent through the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") system. Pet. App. 6 & n.3. Banks use the SWIFT system to send and receive international electronic fund transfers. *See id.* at 6 n.3. Transfers involving U.S. dollars are often routed through intermediary banks in New York, including Bank of America. *See ibid.* The subpoena directed Bank of America to produce documents relating to transactions conducted through its SWIFT portal identifying Argentina as the beneficiary, originator, or any other related party to a transaction. *See id.* at 6; *see also* C.A. J.A. 672-73. Those documents will enable NML to track the flow of funds to locate Argentina's assets. *See, e.g.*, Pet. App. 6 & n.3.

NML's subpoena to BNA sought information about Argentina's accounts at BNA, other property obtained by BNA on Argentina's behalf, debts owed by BNA to Argentina, and flows of funds into and out of Argentina's accounts. Pet. App. 6. Like the Bank of America subpoena, the BNA subpoena defined "Argentina" to include entities controlled by, or acting on behalf of, Argentina. *See ibid.*

b. Argentina moved the district court to quash the Bank of America subpoena, and both banks objected to the subpoenas. Pet. App. 7. NML, in turn, moved to compel compliance. *Ibid.* Argentina joined the banks in opposing NML's motions, contending

that the subpoenas violated its immunity from attachment and execution under Sections 1609 and 1610 of the FSIA.

Even before the district court ruled on those objections, NML agreed to narrow its subpoenas by excluding the names of some Argentine officials from the initial SWIFT message search and by entering into a protective order affording confidential treatment to documents designated as confidential by the banks. C.A. J.A. 796-97, 930-31.

At a hearing on August 30, 2011, the district court denied Argentina's motion to quash and granted NML's motions to compel compliance with both subpoenas, with the understanding that the parties would negotiate further to narrow the subpoenas to discovery that was reasonably calculated to lead to attachable property. Pet. App. 45, 49-51. In so ruling, the district court emphasized that NML had been forced to seek the discovery at issue only because of Argentina's "behavior" and its refusal to "comply with its legal obligations." *Id.* at 45, 47-48. The court confirmed its August 30 ruling in a written order on September 2, 2011. *See id.* at 21-22.

In accordance with the district court's ruling, NML proposed further limitations on its subpoenas. Bank of America negotiated with NML and soon began producing documents. Pet. App. 8. BNA refused to negotiate or to comply with its subpoena, but the district court in December 2011 ordered it to comply with the modified subpoena. *Ibid.*[*]

---

[*] BNA subsequently produced documents that it maintained in New York and Miami, but refused to produce documents maintained outside the United States on the ground that their disclosure would violate local law. The district court, however,

[Footnote continued on next page]

c. Argentina appealed the district court's September 2 discovery order; the banks did not. The Second Circuit affirmed the order, rejecting Argentina's argument that FSIA attachment immunity barred NML from obtaining post-judgment discovery in aid of execution from the banks. Pet. App. 9, 12-20.

The court of appeals began by recognizing that "[a] district court has broad latitude to determine the scope of discovery and to manage the discovery process," "that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts," and that "[i]t is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets." Pet. App. 13-14 (citing Fed. R. Civ. P. 69(a)(2) and N.Y. C.P.L.R. § 5223). Consistent with these principles, the court of appeals held for two independent reasons that the district court did not abuse its discretion in ordering the banks to comply with NML's subpoenas.

First, the court explained, the discovery order "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all; it simply mandates [the banks'] compliance with subpoenas." Pet. App. 15. Although the district court lacked "the power to attach Argentinian property in foreign

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[Footnote continued from previous page]
determined that, "with the exception of [one country], complying with this court's orders would not violate the various countries' laws," and in any event that "in all countries . . . requiring compliance with this court's orders is appropriate since the balance of applicable factors weighs in favor of disclosure." D.E. 535, at 2-3, 7.

countries," *id.* at 15-16, the court of appeals emphasized that "the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question," *id.* at 16. Rather, as the court of appeals had held in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"), the power to order such discovery derives "from [the district court's] power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." Pet. App. 16 (citing *Rafidain II*). Here, "Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," *id.* at 18, and thus NML could obtain discovery about Argentina's assets, *id.* at 16-17.

The court of appeals acknowledged that the Seventh Circuit had reached a conclusion different from *Rafidain II* in *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). Pet. App. 17. In *Rubin*, the Seventh Circuit held that the FSIA requires a judgment creditor to identify specific, potentially attachable assets as a prerequisite for obtaining discovery from a foreign state in aid of execution. 637 F.3d at 796. The Second Circuit noted that *Rubin* conflicts with *Rafidain II* "to the extent [the Seventh Circuit] concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign." Pet. App. 17.

Second, the court of appeals held that the discovery order did not infringe Argentina's attachment immunity because "the subpoenas . . . were directed

at [Bank of America] and BNA—commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege." Pet. App. 19. "Thus, the banks' compliance with [the] subpoenas will cause Argentina no burden and no expense." *Ibid.* And while Argentina might claim privilege over some information, "[t]he FSIA says nothing about privilege," and "it appears that Congress intended for courts to handle claims of privilege using the existing procedures under the Federal Rules." *Ibid.* (citing H.R. Rep. No. 94-1487, at 23 (1976)). Normal discovery rules, the court explained, can protect any privileged or confidential information. *See id.* at 20.

The court of appeals recognized that, "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others, to the extent that immunity has not been waived." Pet. App. 20. Discovery from the banks, however, "does nothing to endanger Argentina's sovereign immunity." *Ibid.*

REASONS FOR DENYING THE PETITION

The Second Circuit correctly allowed post-judgment discovery in aid of execution from non-sovereign third-party banks. That decision implicates no circuit split, is correct under the FSIA and this Court's precedent, promotes important federal interests, and accords with the weight of authority allowing post-judgment discovery in aid of execution under the FSIA.

Although there is a shallow circuit split on a separate question under the FSIA—involving the circumstances under which a judgment creditor may pursue post-judgment asset discovery from a foreign

state itself—this case does not squarely present that issue. And even if it did, this Court declined in June 2012 to resolve this very conflict. Nothing has changed in the intervening months that would counsel a different result here. Indeed, the only pertinent change is that the Second Circuit has expressly acknowledged the conflict, but that acknowledgment militates in favor of waiting so that the Seventh Circuit can have an opportunity to recede en banc from its outlier position. The petition for a writ of certiorari should be denied.

I. THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY QUESTION ON WHICH THE COURTS OF APPEALS HAVE DIVIDED.

The Second Circuit affirmed an order compelling discovery from two third-party, non-sovereign commercial banks—not discovery from a foreign state. *See* Pet. App. 9. In each decision invoked by Argentina as part of the lower-court split, by contrast, discovery was sought from a foreign sovereign itself or from one of its agencies or instrumentalities. *See, e.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011) (Islamic Republic of Iran), *cert. denied*, 133 S. Ct. 23 (2012); *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 174, 176 (2d Cir. 1998) ("*Rafidain I*") (agencies or instrumentalities of Iraq). This distinction makes all the difference.

Whatever grounds may support protecting foreign states from discovery in aid of execution, those grounds—like the FSIA itself—do not apply to non-sovereigns. Sovereign immunity is "designed to give *foreign states and their instrumentalities* some protection from the inconvenience of suit." *Republic of Philippines* v. *Pimental*, 553 U.S. 851, 865 (2008)

(emphasis added; internal quotation marks omitted); *see also* Pet. App. 19 ("[S]overeign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation."). In the discovery context, this means that sovereign immunity applies (if at all) "to protect *foreign sovereigns* from the burdens of litigation, including the cost and aggravation of discovery." *Rubin*, 637 F.3d at 795 (emphasis added); *see also* 28 U.S.C. § 1609 (applying only to "the property in the United States of a foreign state").

Foreign states do not face "the cost and aggravation of discovery"—or the manifold "burdens of litigation" more generally—when they do not bear the responsibility of responding to the discovery at issue. *Rubin*, 637 F.3d at 795. The government has maintained that "[c]ompelling *a foreign state* to produce extensive material in discovery concerning its assets" could, in some circumstances, "impose significant burdens and impugn the state's dignity." U.S. Br. 11, *Rubin*, No. 11-431 (emphasis added); *see id.* at 13, 14-15 (same). But where, as here, a United States court has not "force[d] *a foreign state* to shoulder the burden of assembling . . . and producing" information about its assets, *id.* at 15 (emphasis added), no sovereign has been subjected to "the inconvenience of suit," *Pimental*, 553 U.S. at 865 (internal quotation marks omitted). NML's subpoenas impose no burden of litigation or judicial process at all on Argentina: The subpoenas seek only business records from third-party banks that those banks already possess. They do not require Argentina to take any action or to produce any information.

Argentina contends that discovery from non-sovereign third parties "will . . . inevitably spill over into equally intrusive discovery of the party itself."

Pet. 19. But Argentina cannot explain why, if discovery reveals property that is subject to attachment or execution, a judgment creditor would then "inevitably" seek still *further* discovery instead of moving to seize the property. And if the judgment creditor did seek such discovery, the courts only then would confront the immunity issue that Argentina seeks to inject prematurely into this case. Tellingly, Argentina cites nothing at all for its speculation about the "spill over" effects of the decision below.

Argentina similarly cannot muster any support for its claim that, "when third parties are forced to submit to costly discovery devices because they have done business with, and therefore have information regarding, a state, those costs will be passed on to the state in one form or another." Pet. 19-20. Yet even if this were so, there is no basis for concluding that the FSIA contains an implicit limitation on discovery from non-sovereigns based on these remote, speculative costs. At a minimum, this question is far removed from the circuit split that Argentina claims warrants this Court's review.

The discovery order at issue here does not compel any foreign state to shoulder the burdens of discovery; it imposes discovery obligations exclusively on non-sovereign third parties. Because the case could be resolved on this straightforward ground without addressing the scope of a foreign state's immunity from discovery in aid of execution, this case presents a decidedly poor vehicle for addressing any question on which the courts of appeals have divided.

II. THE SHALLOW CIRCUIT SPLIT REGARDING POST-JUDGMENT ASSET DISCOVERY FROM FOREIGN STATES DOES NOT WARRANT THIS COURT'S REVIEW.

There is a circuit conflict on the question whether FSIA attachment immunity limits discovery in aid of execution from a foreign state, as the result of an outlier decision by the Seventh Circuit. The weight of authority supports the view long endorsed by the Second Circuit, and this Court denied review of the Seventh Circuit's contrary decision just months ago. *See Rubin* v. *Islamic Republic of Iran*, 133 S. Ct. 23 (2012). Nothing has changed to warrant review now.

A. In *Rafidain I*, the Second Circuit held that "permit[ting] full discovery" against a sovereign judgment debtor—there, an agency of Iraq—"would not intrude upon [the foreign state's] sovereign immunity." 150 F.3d at 177. Later in the same case, the Second Circuit affirmed a contempt order against the Iraqi agency for failing to comply with discovery requests, elaborating that, "where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," including discovery designed to identify the judgment debtor's assets. *Rafidain II*, 281 F.3d at 53-54. Such "[d]iscovery of a judgment debtor's assets," the court emphasized, "is conducted routinely under the Federal Rules of Civil Procedure." *Ibid.*

The Seventh Circuit created a circuit split with *Rafidain I* and *II* in 2011, when it held in *Rubin* that the FSIA permits discovery in aid of execution only with respect to "*specific property*" that the judgment creditor has *already* "identified" as "potentially subject" to attachment. 637 F.3d at 799 (emphasis add-

ed). "[T]o the extent [*Rubin*] concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign," the Second Circuit explained below, it "conflict[s] with [the] holding in *Rafidain II*." Pet. App. 17.

The Seventh Circuit's decision in *Rubin* is the minority view. The Second Circuit has reached the contrary result in several cases, and its position accords with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), which Argentina curiously declines to mention. *Cf.* Pet. App. 16 (citing *Richmark*). *Richmark* upheld an order requiring "an arm of the [Chinese] government" to provide "discovery [regarding its] assets worldwide," which was designed to "identif[y] . . . current assets in order to execute the judgment." 959 F.2d at 1471-72, 1475. The Ninth Circuit explained that, although the FSIA "does not empower United States courts to levy on assets located outside the United States," *id.* at 1477, a district court may order discovery into the identity and location of a foreign state's assets to allow the judgment creditor "to determine which courts" would have jurisdiction over those assets. *Id.* at 1478.

This Court was presented in *Rubin* with the conflict between the Second and Ninth Circuits, on the one hand, and the Seventh Circuit, on the other. After requesting the views of the United States, which recommended denying certiorari, this Court declined review. *See* 133 S. Ct. at 23. Nothing has changed since then to alter this conclusion. The Second Circuit has now acknowledged that *Rubin* conflicts with

Rafidain II, *see* Pet. App. 17, but this counsels in favor of denying the petition here, to afford the Seventh Circuit a chance to resolve the conflict itself: Now that the Second Circuit has recognized the conflict, the Seventh Circuit may consider the question presented en banc—a path that was effectively foreclosed in *Rubin* because half of the Seventh Circuit's active judges were recused. *See Rubin*, 637 F.3d at 783 n.*.

B. Argentina is mistaken that the decision below conflicts with decisions of the Fifth and Ninth Circuits. *See* Pet. 15-17. Argentina imagines a conflict based on these circuits' suggestion that "[d]iscovery . . . should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). The Second Circuit, however, has repeatedly endorsed this same approach to discovery against a foreign state. *See, e.g.*, *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *see also* Pet. 17 (quoting other Second Circuit decisions).

Argentina does not claim that the Fifth and Ninth Circuits have applied this "circumspect[ion]" to announce a categorical limitation on general asset discovery from a foreign state, as the Seventh Circuit did in *Rubin*. It could hardly do so in light of the Ninth Circuit's decision in *Richmark*. And the fact that a district court can exercise its discretion to ensure that discovery against a foreign sovereign proceeds cautiously does not mean, as Argentina appears to assume, that the FSIA broadly prohibits

post-judgment discovery into a foreign state's assets. As the Second Circuit noted in *Rafidain I*, a district court can appropriately "weig[h] the benefits of additional discovery against the intrusiveness to [the foreign state] of permitting such discovery." 150 F.3d at 175. In *Af-Cap*, for instance, the Ninth Circuit affirmed a district court's decision to deny "discovery requests [that] had 'gone too far.'" 475 F.3d at 1096.

Yet this discretionary inquiry is not "based on an interpretation of FSIA preemption." *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process." *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (internal quotation marks omitted); *see also* Pet. App. 13 ("A district court has broad latitude to determine the scope of discovery and to manage the discovery process."). There is therefore nothing surprising or conflicting in the fact that the Second Circuit (in the *Rafidain* cases) and the Ninth Circuit (in *Richmark*) have permitted asset discovery in aid of execution to proceed against a foreign state while at the same time recognizing the need to act circumspectly in this area.

III. The Decision Below Is Correct And Respects The Balance Struck In The Foreign Sovereign Immunities Act.

This Court's review is not warranted for the further reasons that the Second Circuit's decision is correct, accords with this Court's caselaw, and promotes important policies embodied in federal law.

A. Federal law authorizes broad discovery in aid of execution. Under Federal Rule of Civil Procedure 69(a)(2), "[a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor"—under the same rules that govern pre-trial

discovery. *See, e.g.*, *Natural Gas Pipeline Co.* v. *Energy Gathering Inc.*, 2 F.3d 1397, 1405 (5th Cir. 1993). Under Rule 26(b)(1), in turn, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

"Congress kept in place" this "normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011). Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610 (limiting Section 1609's grant of immunity). But neither section says anything about discovery. There is therefore nothing "sweeping" or "remarkable" (Pet. 17) in concluding that the FSIA itself does not limit post-judgment discovery in aid of execution. To the contrary, it would be sweeping and remarkable to read the FSIA's silence regarding the scope of post-judgment discovery as implicitly creating an atextual immunity from such discovery. *See Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011) (courts may not adopt a statutory construction with "no basis or referent in [the statute's] language").

In accordance with the normal rules of discovery and the FSIA, the Second Circuit correctly affirmed the district court's order allowing post-judgment discovery regarding Argentina's assets. Even if that discovery had been directed to Argentina itself, *but see supra* Part I, asset discovery is not an act of attachment or execution; it is only discovery—and thus is permitted under the FSIA subject to the district court's broad discretion to establish appropriate limitations based on the circumstances before it.

Argentina suggests that the subpoenas conflict with the FSIA because they will uncover information about assets that, because they are outside the United States, are supposedly immune from attachment and execution. *See, e.g.*, Pet. 2, 10-11, 27. Whether the assets are located in the United States or abroad, the discovery orders at issue here do not themselves effect an attachment or execution. And in any event, the FSIA does not render foreign-held assets *immune* from attachment and execution; instead, Section 1609 provides attachment immunity only for certain "property *in the United States* of a foreign state" (emphasis added).

Courts are authorized to allow, and routinely order, discovery in aid of execution of their judgments in other states or countries. *See, e.g.*, *Nat'l Serv. Indus., Inc.* v. *Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (under Federal Rule 69(a)(2), a judgment creditor is entitled to obtain discovery relating to the judgment debtor's assets "wherever located"). Neither the FSIA nor any other limitation on the district court's discretion prohibits such commonplace discovery in the sovereign context.

B. The decision below also accords with important federal policies. "[T]he courts of the United States undoubtedly have a vital interest in providing a forum for the final resolution of disputes and for enforcing these judgments." *Reinsurance Co. of Am., Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990). The FSIA represents Congress's attempt to balance this weighty interest with the comity interests of foreign states. By ensuring that American judgment creditors may obtain the information necessary to enforce their judgments

against foreign states, the Second Circuit has respected that balance.

The United States has long been a "major source of private international credit," *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985), and American lenders hold many billions of dollars in foreign sovereign debt, *see* David Reilly, *Euro Pain Could Blow Back on Big U.S. Banks*, Wall St. J., May 14, 2010, at B14. As a result, "the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders." *Pravin Banker Assocs., Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

A well-functioning market for sovereign debt depends on investors' confidence that they will be able to enforce loan agreements with foreign countries—and to collect on any judgments obtained. "Experience shows that debt markets work best when the rights of creditors are protected most effectively." Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 Am. Econ. Rev. 85, 85 (2003).

The "heart of the problem" for investors in sovereign debt is that "it has become exceedingly difficult for creditors to actually collect on their debts." Scott, *supra*, at 9. To be sure, much of this problem is the result of the FSIA's limitations on attachment and execution, and similar provisions in other countries' laws. But if creditors cannot obtain the information needed to locate even non-immune assets to satisfy a judgment in their favor—despite having won the case on the merits—then enforcement against a recalcitrant sovereign such as Argentina becomes near-

ly impossible. If judgments or debts are to be paid only at the sovereign's option, lending to foreign countries is a risky proposition indeed, and creditors will take that information into account in deciding whether to lend (and, if so, at what rate). *Cf.* Alexander Hamilton, *First Report on the Public Credit* (Jan. 14, 1790), *in* 2 *The Works of Alexander Hamilton* 227, 228 (Henry Cabot Lodge ed. 1904) ("[W]hen the credit of a country is in any degree questionable . . . it never fails to give an extravagant premium, in one shape or another, upon all the loans it has occasion to make.").

Further, there is a large secondary market in sovereign debt that could be jeopardized if that debt becomes more difficult to enforce because it is impossible to obtain information about the debtor's assets. The secondary market enables the primary market to function by allowing primary creditors to reduce their exposure to questionable debts. *See* Fernando Broner *et al.*, *Sovereign Risk and Secondary Markets*, 100 Am. Econ. Rev. 1523, 1523 (2010). For this reason, the "long term effect" of "rendering otherwise valid debts unenforceable" would be "significant harm" to "developing nations and their institutions seeking to borrow capital" in the United States. *Elliott Assocs., L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999). If the "holders of debt instruments" know that they will "have substantial difficulty selling those instruments [in the secondary market] if payment were not voluntarily forthcoming," that would "add significantly to the risk of making loans to developing nations with poor credit ratings"—and "[t]he additional risk would naturally be reflected in higher borrowing costs to such nations." *Ibid.*

C. In urging this Court's review, Argentina relies heavily on "the important interests the United States has raised" in *amicus* briefs—particularly its invitation brief filed with this Court in *Rubin*. Pet. 27; *see id.* at 26 n.16, 27-28. But the government recommended that this Court *deny* certiorari in *Rubin*. *See* U.S. Br. 1, 8, 23, *Rubin*, No. 11-431. And its brief in *Rubin* underscores why this Court should also deny certiorari here.

The government emphasized in *Rubin* that "the precise content and import" of the Seventh Circuit's holding "remain to be determined in future cases." U.S. Br. 8, *Rubin*, No. 11-431; *see id.* at 16-17. In the months since this Court denied certiorari in *Rubin*, the Seventh Circuit has not determined "the precise content and import" of *Rubin*'s holding. And the decision below simply accorded with existing circuit precedent: the Second Circuit had already, in *Rafidain I* and *II*, cemented a position from which the Seventh Circuit departed in *Rubin*. *See* Pet. App. 17 (recognizing existing conflict between Second Circuit precedent and *Rubin*).

If the Second Circuit's holding here could actually "cause grave harm to the foreign relations of the United States and the treatment of the United States in litigation abroad," Pet. 26, that would also have been true when the government filed its brief in *Rubin*. Yet the government asked this Court to deny certiorari as premature. On the government's own view of the question presented in *Rubin*—embraced by Argentina here, *see id.* at 26-28—certiorari should likewise be denied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The petition presents the critically important question of whether, in the context of judgment enforcement proceedings against a foreign state, "the FSIA plainly applies and limits the discovery process," as the Seventh Circuit held in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795–97 (7th Cir. 2011), or whether the FSIA has no application, because, as the Second Circuit erroneously concluded, "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party." Pet. App. A at 18; *see also id.* at 16–17 (Second Circuit "disagree[s]" with *Rubin* because "[w]hether a particular sovereign asset is immune from attachment . . . under the FSIA . . . does not affect discovery").

NML is wrong to characterize this circuit split as "shallow." NML Opp. at 11, 15.

First, the difference in holding between *Rubin* and this case is hardly a legal nuance—the FSIA either applies to post-judgment processes (as the Seventh Circuit held, consistent with the Fifth and Ninth Circuits, *see infra*) or it does not (as the Second Circuit concluded). These diametrically opposed legal rules have already produced district court decisions within the Second Circuit applying its rule that the FSIA places no limitation on post-judgment asset discovery of a foreign sovereign. *See Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic*, No. 10 Civ. 5256, 2013 WL 541259, at *8 (S.D.N.Y. Feb. 11, 2013); *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715, 2013 WL 857730, at *3

S.D.N.Y. Mar. 7, 2013). Such decisions exist in no other circuit.

Second, NML is wrong that the Seventh Circuit is an "outlier" that will "recede." NML Opp. at 12. *Rubin* is consistent with decisions of the Fifth and Ninth Circuits, which have held that because the FSIA applies to post-judgment asset discovery, discovery must be ordered "circumspectly and *only* to verify allegations of specific facts crucial to the *immunity* determination." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (emphasis added) (internal quotation marks omitted); *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095–96 (9th Cir. 2007); *see also* U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *15, *19. This formulation—which the Second Circuit itself used in its own prior precedent concerning discovery of foreign states under the FSIA, *see* Rep. Pet. at 16–17—was cited by Argentina as the rule of decision here, but was rejected by the Second Circuit because of its unprecedented conclusion that the FSIA is irrelevant to post-judgment asset discovery.

NML is again wrong in trying to limit the holdings of the Fifth and Ninth Circuits as casual "suggestion[s]" to district courts. NML Opp. at 17. The instructions by these Courts of Appeals that discovery must relate to potentially attachable or executable assets follow directly from the legal principle, rejected by the Second Circuit (and only the Second Circuit), that the FSIA's limitations on judgment execution remedies are relevant to post-judgment discovery in aid of that execution. Numerous other circuit court decisions recognize that the FSIA limits the scope of

jurisdictional discovery to information that is crucial to an immunity determination under FSIA Section 1605.[1] These holdings support *Rubin*, *Connecticut Bank*, and *Af-Cap*, because the immunity afforded a foreign state's property in the execution context is broader than that afforded a foreign state in the jurisdictional context. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127–28 (9th Cir. 2010). The justification for "circumspect" discovery is accordingly stronger with regard to post-judgment asset discovery. *See Rubin*, 637 F.3d at 797; U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *11.

Finally, NML's speculation that the Seventh Circuit will have the opportunity to reverse itself *en banc* rings hollow, NML Opp. at 17, because any plaintiffs wanting broad discovery of sovereign assets now have an open invitation to serve their subpoenas in the district courts of the Second Circuit. *See Thai Lao Lignite*, 2013 WL 541259; *Aurelius*, 2013 WL 857730. What is worse, the Second Circuit's decision has begun to sow confusion in other district courts. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, No. CV 12-80185-MISC, 2012 U.S. Dist. LEXIS 1612192, at *2

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[1] *See, e.g., Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063–64 (10th Cir. 2010); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *In re Republic of Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998); *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

(N.D. Cal. Nov. 13, 2012) (applying *Rubin's* holding that FSIA protects sovereigns from burdens of discovery, but accepting Second Circuit's false distinction between discovery served on the sovereign itself and on third parties), *appeal filed*, No. 12-17738 (9th Cir. Dec. 12, 2012). The continued inconsistent application of the FSIA undermines the uniformity in the treatment of foreign sovereigns in United States courts, a primary concern of the statute. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*"). NML's confidence that the Seventh Circuit will somehow self-correct was wholly absent from its counsel's certiorari petition in *Rubin*, which itself stressed the need for uniformity that is undermined by different circuit approaches. *See* Rep. Pet. at 21–22.

2. NML is also wrong that this case represents a "poor vehicle" because the subpoenas at issue here—which sought discovery concerning the Republic, its legally separate agencies and instrumentalities, and its officials—were addressed to third-party banks, and not the Republic itself. NML Opp. at 12. Whether the identity of the party served with the subpoena affects the scope of the FSIA's immunity provisions is not only addressed and answered by the reasoning and holdings of the decisions on both sides of the circuit split, *see* Rep. Pet. at 19–21, but will likely be determined by this Court's resolution of whether the FSIA limits post-judgment asset discovery in the first place. If the Court were to conclude that the FSIA does not limit such discovery, to whom the subpoenas were issued would be irrelevant. If, on the other hand, the Court agrees with the Republic, *Rubin*, and the majority of the circuits that the FSIA limits the permissible scope

of discovery to assets that can be executed on pursuant to Sections 1609 and 1610, the consequence of that holding is that a judgment creditor may not circumvent these restrictions by simply seeking the same information from a third party.

The Second Circuit's reductionist view that the FSIA is inapplicable to discovery directed at foreign state assets but served on third parties, solely because the sovereign does not in the first instance bear the burden of production, cannot be reconciled with Congress's effort, through its enactment of the FSIA, to protect sovereigns from the many burdens of litigation, including the cost, aggravation, and "intrusive inquiries" attendant to the discovery available in United States courts. *Rubin*, 637 F.3d at 796–97; *see also Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008).[2] NML's "forensic examination" of the Republic's international "financial circulatory system," Rep. Pet. at 9; Pet. App. C at 41, including detailed financial information concerning the Republic's current and deceased former Presidents and hundreds of entities that are presumed separate from the Republic, *see Bancec*, 462 U.S. at 626–27, indisputably qualifies as a burdensome "intrusive inquiry." *See* Rep. Pet. at 19.

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[2] *Accord Peterson*, 627 F.3d at 1127; *EM Ltd.*, 473 F.3d at 486; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *In re Papandreou*, 139 F.3d at 251; *Aero Union Corp. v. Aircraft Deconstructors Int'l LLC*, No. 1:11-cv-00484, 2012 WL 3679627, at *8 (D. Me. Aug. 24, 2012); *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 535 (S.D.N.Y. 2001).

But that is not all. Discovery served on third parties but concerning assets of a foreign state can and will result in a myriad of additional "inconvenience[s]," *Pimentel*, 553 U.S. at 865, to the state, including by: a) forcing the sovereign to defend itself in subsequent baseless litigation (the Republic has already borne the cost of litigating in Swiss courts NML's improper *ex parte* attachments of diplomatic bank accounts as a result of the Extraterritorial Asset Discovery Order); b) yielding information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery; and c) forcing third parties to deem their costs of production a cost of doing business with a sovereign state, and to either pass those costs on or refuse to do business with the state. These are not "remote, speculative costs," NML Opp. at 14, but the logical result of permitting judgment creditors the unfettered right to use the "broad discovery in aid of execution" under Rule 69, *id.* at 18, to obtain from third parties information not obtainable from the sovereign itself concerning assets of the sovereign.

Moreover, *Rubin* is premised on the broadly accepted principles that "[sovereign] immunity inheres in the property itself" and that United States courts lack judgment enforcement powers with respect to all property not in the United States and used for a commercial activity here. *Rubin*, 637 F.3d at 796, 799; *Walters*, 651 F.3d at 291; *see also Peterson*, 627 F.3d at 1126–28; *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004). These principles apply whether discovery is sought from a sovereign or from a third party, and establish that *Rubin's* interpretation of the FSIA necessarily

precludes extraterritorial asset discovery, even if served on third parties.

3. NML is also wrong that "[n]othing has changed" since the Court denied certiorari in *Rubin* because the Second Circuit's holding below reflects the "view long endorsed" by that court. NML Opp. at 15 (citing *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998) ("*Rafidain I*"); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*")). In *Rafidain I*, the Second Circuit, in the context of *jurisdictional* discovery—not asset discovery—concerning a potential alter ego of Rafidain Bank, itself noted that FSIA immunity *must* be considered when granting discovery against a sovereign. *See* 150 F.3d at 177. In *Rafidain II*, the court held that subject matter jurisdiction over a foreign sovereign continued through post-judgment enforcement proceedings, "to the extent those procedures and responsibilities are related to [the sovereign's] *commercial activities in the United States*." 281 F.3d at 53 (emphasis added). The Second Circuit's holding in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007), that asset discovery was not proper as a matter of law because the record established that "[Section] 1610's 'commercial activity' exception to immunity from attachment does not apply," was consistent with this prior precedent; no circuit split existed before the Second Circuit reversed course and issued the decision below. U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *8.

NML counters that its reading of the *Rafidain* cases follows from a Ninth Circuit decision upholding an order requiring a commercial instrumentality of the

Chinese Government to provide discovery of its assets worldwide. NML Opp. at 16 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)). However, *Richmark* predates *Af-Cap*, was not even discussed by the *Af-Cap* court, and does not address discovery under the FSIA. *See Richmark*, 959 F.2d at 1471, 1474. NML's reading of *Richmark* further highlights the circuit split here: other than the Second Circuit in this case, Pet. App. A at 16, no other circuit, including the Ninth, has ever read *Richmark* to support the proposition that immunity considerations are irrelevant to post-judgment discovery of sovereign assets. *Cf. Rubin*, 637 F.3d at 797 (distinguishing *Richmark*); U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *21–22 (same).

4. NML argues that because Section 1610 of the FSIA does not explicitly discuss discovery, courts must have "broad discretion" to determine the proper bounds of discovery irrespective of the FSIA. NML Opp. at 19. However, discovery is not a self-executing right of a party; it requires the exercise of judicial power, governed by federal statute. *See* Fed. R. Civ. P. 69(a)(1) ("proceedings supplementary to and in aid of judgment or execution" governed by a federal statute to the extent it applies); *see also* Pet. App. A at 16 (authority to grant post-judgment discovery derives from authority "to conduct supplementary proceedings"). Because, as NML acknowledges, NML Opp. at 2, the FSIA sets forth the "sole, comprehensive scheme" for obtaining and enforcing a judgment against a sovereign state, *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006), the FSIA, and specifically Sections 1609–1611, is the governing statute for all post-judgment proceedings against

foreign sovereigns, including discovery. That discovery by necessity is limited by the inquiry the FSIA gives United States courts jurisdiction to adjudicate—whether the property at issue is potentially property of the foreign state, used for a commercial activity in the United States.

Nor is NML helped by its invocation of the phrase "normal discovery apparatus" from *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011), NML Opp. at 19, since *FG Hemisphere* considered the permissibility of contempt sanctions under the FSIA, not the proper scope of discovery. The D.C. Circuit noted the United States Government's concern about discovery of foreign state assets outside the United States, but could not reach the issue as it had not been raised in the district court. *F.G. Hemisphere*, 637 F.3d at 379. In any event, the commentary from the House Judiciary Committee that "[t]he bill does not attempt to deal with questions of discovery," *id.* at 378 (citing H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("Judiciary Committee Report")), hardly bears the weight NML places on it, since most statutes do not "deal with" discovery, but still define the scope of discovery in proceedings under them.[3]

Indeed, the Judiciary Committee's remark is premised on the belief that "[e]xisting law appears to

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[3] The Judiciary Committee's vague comment must also be discounted because "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

be adequate in this area." Judiciary Committee Report at 23. That law includes Federal Rule of Civil Procedure 26, which requires that discovery be limited to information relevant to a party's claim or defense. When the "claim" is one of judgment enforcement against a sovereign, the only property not categorically immune from process in United States courts is that which is in the United States and used for a commercial activity here. *See* Pet. App. F at 92–94. Neither NML nor the Second Circuit explains how discovery that on its face exceeds this legal limit meets Rule 26's relevance requirement.

Extraterritorial discovery also offends this Court's longstanding precedent, recently reaffirmed in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), that Congressional legislation is presumed to apply domestically, not worldwide. This presumption establishes that whatever authority the FSIA confers on the judiciary, it does not empower it to serve as "a clearinghouse for information . . . that might lead to attachments or executions [against a foreign sovereign] *anywhere in the world*." Pet. App. C. at 31 (emphasis added). NML does not, because it cannot, dispute that the Second Circuit's holding is in direct conflict with *Morrison*, which in and of itself justifies this Court's review, as well as reversal of the decision below.

6. NML also ignores the foreign policy concerns of the United States, instead suggesting that this Court should deny certiorari because "debt markets work best when the rights of creditors are protected most effectively." NML Opp. at 21 (internal quotation marks omitted). NML's *ipse dixit* about what is best for the

"debt markets"—a rule providing unbounded, intrusive discovery that seems hardly consistent with effective market functioning—is at bottom irrelevant, because nothing in the text, structure, or history of the FSIA indicates any intent by Congress to assist the worldwide litigation strategies of professional holdout creditors. To the contrary, the statute was enacted against a backdrop of absolute sovereign immunity from execution and comity towards sovereigns, both of which are incompatible with the worldwide forensic examination endorsed by the Second Circuit.[4]

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[4] Prior to the enactment of the FSIA, courts lacked the power to provide any post-judgment relief, and judgment creditors "had to rely on the foreign state to pay [a] judgment voluntarily." *Conn. Bank*, 309 F.3d at 252; *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984). By partially lowering the barrier to post-judgment remedies by enacting Sections 1609–1610, Congress did not provide for plenary enforcement of judgments against foreign states in United States courts. *See* Pet. App. F at 92–94; Judiciary Committee Report at 28 (the attachment limitations set forth in Section 1610(a) apply to all "supplementary proceedings" under Rule 69).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA, PETITIONER

v.

NML CAPITAL, LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, provides that the property of a foreign state in the United States is immune from attachment, arrest, and execution, 28 U.S.C. 1609, unless the property is "used for a commercial activity in the United States" and falls within a statutory exception to immunity, 28 U.S.C. 1610(a) (Supp. V 2011). The question presented is:

Whether the court of appeals erred in affirming a discovery order requiring the production of comprehensive information concerning a foreign state's assets, without regard to whether those assets could be attached or executed upon in the United States under the FSIA.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of the Nation's history, the Executive Branch—to which this Court deferred—applied a theory of absolute immunity, under which foreign states could not be subject to suit without their consent, and foreign sovereign property was shielded from judicial seizure. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S.

480, 486-487 (1983); *Permanent Mission of India to the United Nations* v. *City of N.Y.*, 551 U.S. 193, 199 (2007); *The Schooner Exchange*, 11 U.S. (7 Cranch) at 144.

In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity from suit for their sovereign acts but not their commercial acts. *Permanent Mission of India*, 551 U.S. at 199; *Verlinden*, 461 U.S. at 487. Even after 1952, however, the "property of foreign states [continued to be] absolutely immune from execution" to satisfy judgments against the state. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976) (*House Report*).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. 1330, 1602 *et seq.* The FSIA establishes that foreign states are immune from the jurisdiction of a United States court, except in specifically enumerated circumstances. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011); see also *House Report* 14. Section 1609 of the FSIA further establishes a general rule that foreign state property in the United States is immune from attachment or execution. Section 1610(a) then sets forth limited exceptions to the rule of immunity provided in Section 1609, under which property owned by a foreign state in the United States "shall not be immune" from execution if it is "used for a commercial activity in the United States" and certain enumerated conditions are satisfied.

2. In 2001, the Republic of Argentina (Argentina) "declared a temporary moratorium on principal and interest payments on more than $80 billion of public external debt." See *NML Capital, Ltd.* v. *Banco Cen-*

tral de la República Arg., 652 F.3d 172, 175 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). Since 2001, Argentina has not made any payments on the defaulted bonds. *Ibid.* Instead, Argentina restructured approximately 92% of its debt by launching global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms that substantially reduced the value of the securities. *Id.* at 176 & n.4.

Respondent holds debt instruments on which Argentina defaulted. Respondent did not avail itself of Argentina's restructuring process for those bonds. In an agreement governing the debt instruments when they were first issued, Argentina had waived its sovereign immunity from suit as to any claims arising from those instruments. Pet. App. 4 & n.1; see 28 U.S.C. 1605(a)(1). Respondent, along with other bondholders, filed multiple actions seeking repayment of the original debt obligations in the United States District Court for the Southern District of New York. Respondent subsequently obtained judgments against Argentina in the combined amount of approximately $1.6 billion, and the district court has granted summary judgment to respondent in six other cases in which respondent has demanded more than $900 million, including interest. Pet. App. 4.[1]

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[1] In the latter cases, the district court has enjoined Argentina from making payments on the restructured bond debt unless it simultaneously makes payments on the original bond debt held by respondent and others. Rejecting the United States' arguments as amicus curiae that the injunctions were inconsistent with the FSIA and the well-established understanding of the *pari passu* clauses that appeared in the bonds, and that the injunctions could disrupt

3. a. Because Argentina has not satisfied the judgments against it, respondent has "attempted to execute against Argentina's property."[2] Pet. App. 4. In 2010, in an effort to "learn how Argentina moves its assets through New York and around the world," *id.* at 5 (citation omitted), respondent served document subpoenas on two non-party banks, Bank of America and Banco de la Nación Argentina (BNA). Unlike previous discovery requests, which had focused on Argentina's property located in the United States, the two subpoenas sought information about Argentina's assets located outside the United States. *Id.* at 5-6, 11 & n.6, 60-61. Both subpoenas sought comprehensive information relating to accounts maintained anywhere in the world, as well as transaction histories and records of electronic funds transfers, by or on behalf of Argentina, its agencies, instrumentalities, political subdivisions, employees, and specifically identified individuals. *Id.* at 5-6; see 03-cv-8845 Docket entry

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the orderly resolution of sovereign debt crises, the Second Circuit affirmed the injunctions, but remanded for clarification as to their operation. 699 F.3d 246 (2012). This Court recently denied Argentina's petition for a writ of certiorari to review the Second Circuit's interlocutory decision. See No. 12-1494, 2013 WL 3211846 (Oct. 7, 2013). The Second Circuit subsequently entered a final decision affirming the injunctions. 727 F.3d 230 (2013). The court of appeals recently denied Argentina's petition for rehearing. See 12-105 Docket entry No. 1038 (2d Cir. Nov. 19, 2013).

[2] The United States does not condone a foreign state's failure to satisfy the final judgment of a United States court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina should immediately normalize relations with all of its creditors, both public and private.

No. (Docket No.) 338-1, at 12-17 (S.D.N.Y. Aug. 9, 2010); *id.* No. 366-1 (Nov. 1, 2010).

b. The district court approved the subpoenas in principle, and granted respondent's motions to compel the banks' compliance with the requested discovery. Although Argentina contended that the subpoenas were inconsistent with the FSIA's grant of presumptive immunity from execution, the district court concluded that discovery into the worldwide assets of Argentina and related persons and entities was appropriate. Pet. App. 43-44. The court reasoned that "the Republic, through various entities, c[ould] very well be engaged in commercial activities in various places or activity which might involve attachable assets on some other theory in a foreign country." *Id.* at 44. The court further stated that it intended to serve as a "clearinghouse for information about [Argentina's] commercial activity or other activity that might lead to attachments or executions anywhere in the world." *Id.* at 31; Docket No. 457, at 7 (Mar. 26, 2012).

4. Argentina appealed the discovery order. The court of appeals affirmed.[3] Pet. App. 1-20.

The court of appeals first held that post-judgment discovery into a foreign state's property does not implicate immunity from attachment under the FSIA. The court reasoned that compelling discovery concerning Argentina's worldwide assets does not implicate the sovereign immunity that inheres in those assets because requiring disclosure does not in itself "allow [respondent] to attach Argentina's property." Pet. App. 15. The court also explained that Argentina was subject to the district court's jurisdiction for

[3] The court of appeals concluded that the district court's order was appealable under the collateral order doctrine. Pet. App. 9-12.

purposes of determining liability, see 28 U.S.C. 1605(a)(1), and that "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party." Pet. App. 18. Thus, the court reasoned, the district court need not tailor discovery to balance the need for discovery against Argentina's claim to immunity. *Id.* at 19. The court of appeals acknowledged that its conclusion conflicted with *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (2011), cert. denied, 133 S. Ct. 23 (2012), in which the Seventh Circuit held that discovery in aid of execution of a judgment against a foreign sovereign must be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 796 (citation omitted).

The court of appeals then stated that a "second principal reason for holding that the discovery order does not infringe on Argentina's sovereign immunity" is that the subpoenas were directed at "commercial banks that have no claim to sovereign immunity." Pet. App. 19. In the court's view, "the banks' compliance with [the] subpoenas will cause Argentina no burden and no expense," *ibid.*, and as a result, "Argentina's sovereign immunity is not affected," *id.* at 3.

5. The court of appeals denied rehearing. Pet. App. 87-88.

DISCUSSION

Departing from the decisions of other courts of appeals, the Second Circuit erroneously permitted blanket discovery into a foreign state's assets located outside the United States, even though the property could not be attached or executed upon by the district court or any United States court. The court of ap-

peals also erred in holding that the fact that the discovery was directed to third parties eliminated any sovereign-immunity concerns. Those issues are important and recurring, and the court of appeals' decision raises significant foreign-policy concerns for the United States. The petition for a writ of certiorari should be granted.

I. THE COURT OF APPEALS BROADLY HELD THAT THE FSIA DOES NOT CONSTRAIN GENERAL DISCOVERY INTO A FOREIGN STATE'S ASSETS

The court of appeals held that the sovereign-immunity principles embodied in the FSIA's execution provisions do not constrain the district court's authority to order broad post-judgment discovery into sovereign assets that are not subject to attachment under the FSIA. In the court of appeals' view, "[w]hether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery," Pet. App. 16, and the district court "could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements." *Id.* at 18.

As a result of the decision below, then, the governing rule in the Second Circuit is that a district court may order discovery into a foreign state's property—including discovery against the foreign state itself—without regard to whether the discovery seeks information about property that is immune from attachment by a United States court under the FSIA. Indeed, district courts have already relied on the decision below in ordering general asset discovery against a foreign state itself. See *Thai Lao Lignite (Thai.) Co.* v. *Government of Lao People's Democratic Repub-*

lic, 924 F. Supp. 2d 508, 519 (S.D.N.Y. 2013) (citing Second Circuit decision in holding that "discovery may proceed as broadly as it would in a typical post judgment context without regard to immunity issues"); see also *Servaas Inc.* v. *Republic of Iraq*, No. 09-cv-1862, 2013 WL 3146787, at *5 (S.D.N.Y. June 19, 2013) (same); *Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-cv-2715, 2013 WL 857730, at *3 (S.D.N.Y. Mar. 7, 2013) (ordering extraterritorial asset discovery against Argentina itself and rejecting assertion that "the FSIA limits the scope of execution-related discovery to assets located in the United States").

II. THE COURT OF APPEALS' DECISION IS INCORRECT

A. Courts Must Exercise Their Authority To Order Discovery Concerning A Foreign State's Assets Consistent With The FSIA's Presumptive Immunity From Execution And The Comity And Reciprocity Concerns Embodied In The Statute

1. The FSIA codifies, with some modifications, long-recognized foreign sovereign-immunity principles by establishing two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an enumerated exception to immunity applies. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011). Second, the property of a foreign state is immune from attachment and execution unless an exception to that immunity applies. 28 U.S.C. 1609-1611 (2006 & Supp. V 2011).

Consistent with pre-FSIA practice, under which foreign state property was absolutely immune from execution even if the sovereign had been held to be subject to suit, the exceptions to attachment immunity are narrower than, and independent of, the exceptions

to jurisdictional immunity. *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012); see *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010). Even when the foreign state has been held subject to the court's jurisdiction under Sections 1605 through 1607, the "property in the United States of a foreign state," 28 U.S.C. 1609, is immune unless it is "used for a commercial activity in the United States" and certain other conditions are satisfied, 28 U.S.C. 1610(a) (Supp. V 2011). See *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011).

Because the FSIA expressly provides that a foreign state's property is immune under Section 1609 absent an applicable exception, see *Peterson*, 627 F.3d at 1127-1128, a judgment creditor seeking to enforce a judgment against the property of a foreign sovereign bears the burden of identifying the property to be executed upon and proving that it falls within an exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; *Rubin*, 637 F.3d at 796; *Walker Int'l Holdings Ltd.* v. *Congo*, 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

2. When the availability of an asset for execution turns on factual issues, a judgment creditor may seek discovery to develop facts establishing that the property is subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances, see *House Report* 23, a district court ordering discovery should not proceed as though only private interests were implicated, but should instead tailor discovery in a manner that respects the general rule of immunity Congress established in Section 1609.

The presumptive immunity in the FSIA protects foreign sovereigns not only from liability or seizure of their property, but also from "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd.* v. *Republic of Arg.*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert. denied, 552 U.S. 818 (2007); *Rubin*, 637 F.3d at 796-797; *Peterson*, 67 F.3d at 1127 (similar). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution under the FSIA, would be inconsistent with both the FSIA's protections and the comity principles the statute implements. See *Rubin*, 637 F.3d at 795-797. The court of appeals was therefore wrong to conclude that "because the district court ordered only discovery, not the attachment of sovereign property, * * * Argentina's sovereign immunity is not affected." Pet. App. 3.

The court of appeals made a similar error in reasoning (Pet. App. 18) that once the district court "had subject matter * * * jurisdiction over Argentina," it could order discovery in aid of execution "as over any other party." The FSIA unambiguously provides that even when a foreign state is subject to suit, its property remains immune from attachment or execution except as specifically provided in Sections 1610 and 1611. 28 U.S.C. 1609. Congress thus provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment, even if they are subject to the court's jurisdiction—and attendant discovery—for purposes of adjudicating the merits of the underlying suit. See *Peterson*, 627 F.3d at 1127-1128.

Discovery in aid of execution accordingly should be conducted in a manner that respects the comity and reciprocity principles that the FSIA was enacted to implement and safeguard. See *Peterson*, 627 F.3d at 1127-1128; cf. *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955). This Court has long recognized that "[t]he judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may . . . affect our relations with it" at least to the same extent as subjecting a foreign state to suit. *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation and internal quotation marks omitted; brackets in original). Similarly here, permitting extensive discovery in aid of execution, irrespective of whether any specified property may actually be subject to attachment, could impose significant burdens on the foreign state and impugn its dignity, which could harm the United States' foreign relations.

Such discovery could also lead to reciprocal adverse treatment of the United States in foreign courts. The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad. Cf. *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of the "concept of reciprocity" in international law); *McCulloch* v. *Socie-*

dad Nacional de Marineros de Hond., 372 U.S. 10, 21 (1963).

B. The Court Of Appeals Erred In Upholding The District Court's Discovery Order

1. Consistent with the principles discussed above, a district court presented with a discovery request concerning foreign-state property must consider the judgment creditor's interest in discovery in the context of the foreign state's "legitimate claim to immunity," *EM Ltd.*, 473 F.3d at 486, and the principles of comity and reciprocity reflected in the FSIA. Specifically, the court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets. Thus, as most courts of appeals to have addressed the question have held, discovery concerning a foreign state's assets "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin*, 637 F.3d at 796 (quoting *EM Ltd.*, 473 F.3d at 486); see *Connecticut Bank of Commerce* v. *Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007).

2. The district court's order exceeded the limits on appropriate discovery into a foreign state's assets.

The subpoenas are improper insofar as they are directed to assets located outside the United States. The FSIA modified in part the prior legal regime, under which all foreign-state property was absolutely immune from execution, by providing that foreign-state property "in the United States" and "used for a

commercial activity in the United States" is subject to execution if certain additional requirements are met. 28 U.S.C. 1610(a) (Supp. V 2011). The FSIA therefore does not authorize United States courts to order attachment of or execution on sovereign property located outside the United States. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property * * * wherever that property is located around the world."), cert. denied, 552 U.S. 1231 (2008); cf. *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 379-380 (D.C. Cir. 2011) (identifying "serious[]" concerns raised by extraterritorial asset discovery). Because discovery directed to assets located outside the United States is by definition not tailored to aiding the court in exercising the execution authority conferred by Sections 1610 and 1611, the district court should not have allowed discovery into those assets.[4]

Respondent argues (Br. in Opp. 20) that a foreign state's property located outside the United States enjoys no protection (and that a state therefore enjoys no protection from the burdens of discovery concern-

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[4] Respondent argues (Br. in Opp. 16), that the court in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), approved worldwide asset discovery against Beijing Ever Bright, a foreign sovereign instrumentality. But there Ever Bright argued that compliance would violate Chinese state secrecy laws, not that the discovery was inconsistent with the FSIA. The court's only mention of the FSIA occurred in the context of its rejection of Ever Bright's argument that the requirement that it post a bond in order to stay execution pending appeal was inconsistent with the FSIA. *Id.* at 1477-1478.

ing that property) because the FSIA's guarantee of immunity applies only to a foreign state's "property *in the United States*," 28 U.S.C. 1609 (emphasis added). But that statutory language is properly read to reflect the long-established understanding that United States courts as a general matter have no authority to execute upon assets located outside the United States, in another Nation. To enforce a United States judgment by attaching assets in another country, a plaintiff must "obtain recognition * * * of the U.S. judgment in the courts of that country," and then avail itself of that country's procedures for enforcement. *Autotech*, 499 F.3d at 751. Consistent with that understanding of the limits of United States courts' jurisdiction, the FSIA authorizes courts to order execution—and therefore discovery—only with respect to limited categories of foreign-state property that are located in the United States. That framework is the exclusive means of enforcing judgments against a foreign state in United States courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989).

The text and history of the FSIA contain no indication that Congress intended to authorize litigants to harness the power of United States courts to obtain discovery regarding extraterritorial foreign-state assets that are not subject to execution under the FSIA and that may be immune from execution and/or shielded from discovery under the law of the state in which they are located. Permitting such extraterritorial discovery would raise the comity and reciprocity concerns that the FSIA's execution-immunity provisions were enacted to prevent. See *House Report* 26-27; *Peterson*, 627 F.3d at 1127-1128; cf. *Société Natio-*

nale Industrielle Aérospatiale v. *United States Dist. Ct. for the S.D. of Iowa*, 482 U.S. 522, 546 (1987) (extraterritorial discovery in cases "involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation," raises comity concerns, and courts ordering discovery should "demonstrate due respect for * * * any sovereign interest expressed by a foreign state"). Indeed, because "the scope of American discovery is often significantly broader than is permitted in other jurisdictions," *id.* at 542, respondent likely could not obtain such sweeping discovery in the courts of many other Nations. Respondent's effort to compel the disclosure in the United States of information about a foreign state's worldwide assets would thus circumvent the limitations imposed and protections afforded not only by the FSIA, but also by foreign law. Such sweeping discovery may be regarded by foreign states as demonstrating a lack of respect and may cause friction in the United States' foreign relations.

In at least two additional respects, the subpoenas seek information about certain categories of property that are almost certainly immune from attachment or execution, whether in the United States or elsewhere. First, the subpoenas seek information about assets—such as diplomatic property and assets held by Argentina's Central Bank and its Ministry of Defense—that are immune from execution under the FSIA as well as the laws of foreign states. Docket No. 388-1, at 14, 17; see, *e.g.*, *767 Third Ave. Assocs.* v. *Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir.), cert. denied, 510 U.S. 819 (1993); Vienna Convention on Diplomatic Relations art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (providing

for immunity from execution for diplomatic property); see also 28 U.S.C. 1611(b)(1) and (2) (immunity for central bank and military property). Second, the subpoenas seek information about the assets not only of the judgment debtor—Argentina—but also of Argentina's agencies and instrumentalities, as well as certain officials. Absent a showing that assets held by an individual are actually assets belonging to the state, an individual's assets could not be attached to enforce a judgment against a state. Nor does the FSIA "permit execution against the property of one agency or instrumentality to satisfy a judgment against another" (*House Report* 29) unless the plaintiff overcomes the presumption that separate juridical entities should be treated as such. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983). Respondent has not made that showing.

3. The court of appeals was also incorrect to hold categorically that because the "discovery is directed at third-party banks, Argentina's sovereign immunity" under the FSIA "is not affected."[5] Pet. App. 3; *id.* at 19. Immunity from attachment and execution "inheres in the property itself." *Rubin*, 637 F.3d at 799. Because the discovery is directed to property owned by the foreign state (even if, as may often be the case, the requested information about the assets is in the possession of third parties), the foreign state has a

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[5] Although the court of appeals assumed that the subpoenas were directed to non-immune private banks, Pet. App. 19, the court has held that BNA is a sovereign instrumentality of Argentina—which would mean that BNA itself, and its property, are presumptively immune under the FSIA. See *Seijas* v. *Republic of Arg.*, 502 Fed. Appx. 19, 20-23 (2d Cir. 2012) (unpublished).

substantial interest in the discovery. Third-party discovery requests concerning a foreign state's property therefore implicate the comity and reciprocity concerns raised by discovery against the foreign state itself. Cf. *Société Nationale*, 482 U.S. at 546. The disclosure of potentially sensitive sovereign financial information, without regard to whether the assets could be executed upon in the United States or indeed anywhere in the world, would legitimately be of significant concern to the state irrespective of who is required to make the disclosure.

Moreover, contrary to the court of appeals' decision, Pet. App. 19, discovery requests directed at third parties may burden the foreign state itself, as it may have to participate in litigation over the scope and manner of the discovery, as Argentina has had to do in this case. Cf. *Rubin*, 637 F.3d at 796-797. To be sure, once the district court concludes that the discovery would be directed to assets for which there is a reasonable basis to believe that an exception to immunity applies and the court could order execution, see *ibid.*, the court, in exercising its authority to compel compliance with particular discovery requests, may consider whether the principal burden of discovery would be borne by a private party rather than the state itself. But for the reasons stated, the court of appeals erred in holding that sovereign-immunity considerations were irrelevant purely because the discovery order was directed to third-party banks.

III. THIS COURT'S REVIEW IS WARRANTED

A. The Court Of Appeals' Holding That The FSIA Does Not Constrain Post-Judgment Asset Discovery Conflicts With The Decisions Of Other Courts Of Appeals

As the Second Circuit acknowledged, its decision creates a circuit conflict with the Seventh Circuit's holding in *Rubin, supra*.[6] Pet. App. 17. In *Rubin*, the Seventh Circuit reversed a district court order permitting general asset discovery into Iran's assets in the United States on the ground that the order was not tailored to discovery concerning assets that might be subject to attachment under the FSIA. The court explained that one of the purposes of the FSIA's general rule of immunity for foreign-state property is to shield foreign sovereigns from the burdens of "unwarranted litigation costs and intrusive inquiries about their * * * assets," and that as a result, "the FSIA plainly applies and limits the discovery process." 637

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[6] Contrary to respondent's argument (Br. in Opp. 15-17), the Second Circuit had not previously held that a district court may order asset discovery without regard to the FSIA's limitations on execution. In *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998), the court permitted discovery against Rafidain, a foreign state instrumentality that had been held non-immune, concerning whether another entity could be subject to suit as Rafidain's alter ego. The court had no occasion to address the scope of post-judgment asset discovery. In *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir.), cert. denied, 537 U.S. 813 (2002), the court held that the district court's jurisdiction over Rafidain continued through post-judgment execution proceedings, but it emphasized that its holding concerned only "the court's subject matter jurisdiction, not its discretion" in ordering discovery, and that "[n]o doubt, courts should proceed with care" in ordering asset-related discovery. *Id.* at 54.

F.3d at 795-796. The Seventh Circuit therefore held that a district court should order post-judgment asset discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 796 (citation omitted).

The Fifth and Ninth Circuits have similarly recognized that sovereign immunity principles limit the appropriate scope of post-judgment discovery directed at a foreign sovereign's assets. See *Connecticut Bank of Commerce*, 309 F.3d at 260 n.10 (district court should "limit any additional discovery to facts relating to the immunity determination" in execution action); *Af-Cap, Inc.*, 475 F.3d at 1095-1096 (in execution action, discovery order was consistent with the "admonition that discovery against a foreign sovereign should be ordered circumspectly and only to verify allegations of specific facts crucial to the immunity determination") (citation, internal quotation marks, and emphasis omitted).

B. The Question Presented Is Important

The extent to which a foreign state's property may be the subject of broad-ranging discovery, regardless of whether that property could be subject to execution in the United States, is an important question that has significant implications for the United States' foreign relations. See pp. 11-12, *supra*. The question is also a recurring one, as the number of decisions addressing the appropriate scope of post-judgment discovery into a foreign state's assets demonstrates. See pp. 7-8, 12, *supra*.

This Office is informed by the Department of State that the decision below has raised significant foreign-relations concerns for the United States. The far-reaching nature of the discovery order in this case—

which requires production of information about extra-territorial assets and transactions of a foreign state, as well as those of state agencies and officials (including a sitting head of state) who are not the subject of the action and whose assets respondents have not shown to be subject to execution—raises especially sensitive foreign-policy concerns. The prospect of individual judgment creditors relying on the decision to pursue such broad and intrusive inquiries into foreign sovereign financial holdings, potentially disrupting the foreign state's banking relationships, or to delve into a head of state's bank accounts in the context of a suit against her government, could create serious impediments to the United States' bilateral relationships. Permitting such comprehensive discovery may also have reciprocal consequences for the treatment of the United States in foreign courts.

The need for this Court's review is particularly pronounced in light of the special role New York, and the courts of the Second Circuit, play in litigation involving foreign sovereigns. Many suits and judgment-enforcement proceedings against foreign states take place in the Second Circuit because many foreign states, agencies, and instrumentalities hold financial assets in New York or conduct financial transactions there. The court of appeals' decision, which denies foreign sovereigns the protections of FSIA immunity in the context of post-judgment discovery, has already emboldened judgment creditors to demand sweeping discovery of foreign-state assets, see pp. 7-8, *supra*, and will likely continue to do so in the future.[7]

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[7] Respondent observes (Br. in Opp. 23) that, in response to this Court's request for the views of the Solicitor General, the United States recommended that the Court deny review in *Rubin*. Be-

C. This Case Is A Suitable Vehicle To Resolve The Question Presented

Contrary to respondent's argument (Br. in Opp. 12-14), the court of appeals' reliance, as an additional justification for its decision, on the fact that the subpoenas were directed to non-immune third parties, does not render this case a poor vehicle to resolve the circuit split created by the court of appeals' decision.

The fact that the court of appeals' decision rested in part on the third-party nature of the discovery would not prevent this Court from deciding the question whether the FSIA limits the appropriate scope of post-judgment discovery into a foreign state's assets. The court of appeals made clear that its conclusion that the FSIA does not constrain post-judgment discovery—regardless of the identity of the entity to whom the discovery is directed—was independently sufficient to support its judgment. *E.g.*, Pet. App. 19; pp. 7-8, *supra*.

Because Argentina would have to establish that both grounds of the Second Circuit's decision are incorrect in order to prevail in this case, respondent contends (Br. in Opp. 14) that this case "could be resolved on [the] straightforward ground" that the discovery is directed to third parties. But Argentina has challenged both bases for the court of appeals' deci-

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cause the Seventh Circuit correctly held that the FSIA's limitations on execution constrain post-judgment asset discovery, its decision did not subject foreign states to wide-ranging discovery that is inconsistent with the FSIA. At the time of the *Rubin* decision, moreover, there was no circuit conflict. U.S. Amicus Br., *Rubin*, *supra*, at 19-22 (No. 11-431). The decision below gives rise to the circuit conflict, as well as the comity and reciprocity concerns, that warrant further review.

sion, and both are fairly included in the question presented. See Pet. i, 18-21. And as discussed above, the view of the United States is that *both* of the Second Circuit's holdings—that the FSIA does not constrain the appropriate scope of post-judgment discovery, and that third-party discovery does not implicate the FSIA—are incorrect and present significant foreign relations concerns. The presence of the additional disputed issue in this case thus does not suggest that the case is an unsuitable vehicle, but rather underscores the need for this Court's review.

Indeed, respondent has taken the position in subsequent proceedings before the district court in this case that the court of appeals' decision establishes that the FSIA does not prevent the district court from ordering worldwide, general asset discovery from Argentina itself. See Docket No. 553, at 6-10 (June 27, 2013) (respondent argued that under the Second Circuit's decision, asset discovery "does not implicate immunity" and broad discovery against Argentina is permissible). The district court has since granted respondent's requested discovery based on its understanding that the court of appeals held in the decision below that "the Foreign Sovereign Immunities Act does not really prevent discovery" against Argentina. 03-cv-8845 Docket entry No. 562, at 30 (transcript of Sept. 3, 2013 proceedings); *id.* No. 565 (ordering compliance).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

RECORD
AND
BRIEFS

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In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Relevant Docket Entries . . . . . JA 1

United States Court of Appeals for the Second Circuit, *NML Capital, Ltd. v. Republic of Argentina*, Lead Case No. 11-4065, [Member Case Nos. 11-4077; 11-4082; 11-4100; 11-4102; 11-4117; 11-4118; 11-4133; 11-4153; 11-4165; 11-4182]
Relevant Docket Entries . . . . . JA 17

Declaration of Carmine Boccuzzi, with Exhibits A-Q in Support re: 306 Motion to Quash / Notice of Motion to Quash Subpoena, United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG, [R.307] (May, 17, 2010) . . . . . N/A

Exhibit A
Notice of Subpoena in a Civil Case, Bank of America N.A. . . . . JA 39

Declaration of Joshua I. Sherman in Support re: 365 Motion to Compel Banco de la Nacion Argentina to Produce Documents, United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG [R.366] (November 1, 2010) ..... N/A

Exhibit A
Subpoena in Civil Cases, Banco de la Nación Argentina ..... JA 77

Declaration of Mark S. Sullivan in Opposition re: 365 Motion to Compel Banco de la Nacion Argentina to Produce Documents, United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG [R.393] (February 10, 2011) ..... N/A

Exhibit 1
Persons or Entities Falling Under the Definition of "Argentina" ..... JA 92

Declaration of Eric C. Kirsch, United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:08-cv-06978-TPG [R.284] (January 20, 2011) ..... N/A

Exhibit B (excerpt)
Fiscal Agency Agreement (October 19, 1994) ..... JA 106

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Appendix A: Opinion, United States Court of Appeals for the Second Circuit (August 20, 2012) . . . . . App. 1

Appendix B: Opinion, United States District Court, Southern District of New York (September 2, 2011) . . . . . App. 21

Appendix C: Hearing Transcript Excerpts, United States District Court, Southern District of New York (August 30, 2011) . . . . . App. 23

Appendix D: Hearing Transcript Excerpts, United States District Court, Southern District of New York (December 17, 2010) . . . . . App. 52

Appendix E: Order, United States Court of Appeals for the Second Circuit (October 10, 2012) . . . . . App. 87

Appendix F: 28 U.S.C. § 1604
28 U.S.C. § 1605(a)
28 U.S.C. § 1606
28 U.S.C. § 1609
28 U.S.C. § 1610(a)
28 U.S.C. § 1610(d) . . . . . App. 89

RELEVANT DOCKET ENTRIES

United States District Court,
Southern District of New York (Foley Square)
Lead Case No. 1:03-cv-08845-TPG
[Related Case Nos. 05-cv-2434; 06-cv-6466; 07-cv-1910; 07-cv-2690; 07-cv-6563; 08-cv-02541; 08-cv-3302; 08-cv-6978; 09-cv-1707; 09-cv-1708]

NML Capital, Ltd. v. Republic of Argentina

Date Filed	#	Docket Text
		* * *
05/17/2010	306	MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010*. Document filed by The Republic of Argentina.(Boccuzzi, Carmine) (Entered: 05/17/2010)
05/17/2010	307	DECLARATION of Carmine Boccuzzi, with Exhibits A-Q in Support re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010*.. Document filed by The Republic of Argentina. (Boccuzzi, Carmine) (Entered: 05/17/2010)
05/17/2010	308	MEMORANDUM OF LAW in Support re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010*.. Document filed by The Republic of Argentina. (Boccuzzi, Carmine) (Entered: 05/17/2010)

	* * *	
06/17/2010	315	MEMORANDUM OF LAW in Opposition re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010.*. Document filed by NML Capital, Ltd.. (Sher, Jeremy) (Entered: 06/17/2010)
06/17/2010	316	DECLARATION of Robert Brunner in Opposition re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010.*. Document filed by NML Capital, Ltd.. (Sher, Jeremy) (Entered: 06/17/2010)
06/17/2010	317	DECLARATION of Joel M. Miller in Opposition re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010.*. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Sher, Jeremy) (Entered: 06/17/2010)
	* * *	
06/18/2010	319	MEMORANDUM OF LAW in Support of Defendant's MOTION to Quash. Document filed by Bank of America, N.A. (mro) (Entered: 06/21/2010)

	* * *	
06/30/2010	320	REPLY MEMORANDUM OF LAW in Support re: 306 MOTION to Quash / *Notice of Motion to Quash Subpoena, dated May 17, 2010*.. Document filed by The Republic of Argentina. (Attachments: # 1 Certificate of Service)(Boccuzzi, Carmine) (Entered: 06/30/2010)
07/01/2010	321	DECLARATION of Barry J. Glickman. Document filed by Bank of America, N.A.. (mbe) (Entered: 07/02/2010)
	* * *	
07/21/2010	325	DECLARATION of Michael Z. Goldman. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30

		Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37)(Hranitzky, Dennis) (Entered: 07/21/2010)
	* * *	
08/09/2010	336	MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena*. Document filed by NML Capital, Ltd..(Sher, Jeremy) (Entered: 08/09/2010)
08/09/2010	337	MEMORANDUM OF LAW in Support re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena*.. Document filed by NML Capital, Ltd.. (Sher, Jeremy) (Entered: 08/09/2010)
08/09/2010	338	DECLARATION of Joel M. Miller in Support re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena*.. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Sher, Jeremy) (Entered: 08/09/2010)
08/09/2010	339	DECLARATION of Robert Brunner in Support re: 336 MOTION to Compel *Non-Party*

		Bank of America, N.A. to Comply with Subpoena.. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A)(Sher, Jeremy) (Entered: 08/09/2010)
08/10/2010	340	CERTIFICATE OF SERVICE of Notice of Motion to Compel, Memorandum of Law in Support of Motion to Compel, Declaration of Joel M. Miller, Declaration of Robert Brunner served on Bank of America, N.A. on August 9, 2010. Service was accepted by Barry J. Glickman, counsel for Bank of America, N.A.. Document filed by NML Capital, Ltd.. (Sher, Jeremy) (Entered: 08/10/2010)
	* * *	
09/01/2010	345	MEMORANDUM OF LAW in Opposition re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena. Dated September 1, 2010*. Document filed by The Republic of Argentina. (Boccuzzi, Carmine) (Entered: 09/01/2010)
	* * *	
09/16/2010	348	CERTIFICATE OF SERVICE of Plaintiff NML Capital, Ltd.'s Reply Memorandum of Law in

		Further Support of Motion to Compel Bank of America, N.A. to Produce Documents in Compliance with Subpoena served on Defendant The Republic of Argentina and Non-Party Bank of America, N.A. on September 16, 2010. Service was made by Mail and E-Mail. Document filed by NML Capital, Ltd.. (Sher, Jeremy) (Entered: 09/16/2010)
	* * *	
11/01/2010	365	MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*. Document filed by NML Capital, Ltd..(Cohen, Robert) (Entered: 11/01/2010)
11/01/2010	366	DECLARATION of Joshua I. Sherman in Support re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18

		Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U)(Cohen, Robert) (Entered: 11/01/2010)
11/01/2010	367	MEMORANDUM OF LAW in Support re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by NML Capital, Ltd.. (Cohen, Robert) (Entered: 11/01/2010)
		* * *
11/08/2010	371	ENDORSED LETTER addressed to Judge Thomas P. Griesa from Mark S. Sullivan dated November 4, 2010 re: We represent non-party Banco de la Nacion Argentina ("BNA") and write on behalf of all parties to the above caption actions to request that the Court endorse the following, agreed briefing schedule for the November 1, 2010 Motion to Compel BNA to Produce Documents in Compliance with Subpoena (the "Motion") filed by Plaintiff NML Capital, Ltd: December 1, 2010: BNA's memorandum in opposition to Motion, and any supporting papers; December 15, 2010: Plaintiff's reply memorandum in support of

		Motion, and any supporting papers. ENDORSEMENT: Approved. (Responses due by 12/1/2010, Replies due by 12/15/2010.) (Signed by Judge Thomas P. Griesa on 11/8/20/10) (jmi) Modified on 11/10/2010 (jmi). (Entered: 11/09/2010)
11/10/2010	372	DECLARATION of Barry J. Glickman (previously filed in hard copy of September 2, 2010) in Opposition re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena*.. Document filed by Bank of America, N.A.. (Attachments: # 1 Exhibit A)(Glickman, Barry) (Entered: 11/10/2010)
11/10/2010	373	MEMORANDUM OF LAW in Opposition re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena. (previously filed in hard copy on September 2, 2010).* Document filed by Bank of America, N.A.. (Glickman, Barry) (Entered: 11/10/2010)
* * *		
12/10/2010	381	ENDORSED LETTER addressed to Judge Thomas P. Greisa from Mark S. Sullivan, dated 11/30/2010, re: We represent

		non-party Banco de la Nacion Argentina ("BNA") and write on behalf of all parties to the above caption actions to request that the Court endorse the revised briefing schedule for the November 1, 2010 Motion to Compel BNA to Produce Documents in Compliance with Subpoena (the "Motion") filed by Plaintiff NML Capital, Ltd: December 10, 2010: BNA's memorandum in opposition to Motion, and any supporting papers; January 13, 2011: Plaintiff's reply memorandum in support of Motion, and any supporting papers. The Court previously endorsed a briefing schedule with the respective papers due on December 1 and December 15. However, logistics issues, including the translation of documents, caused BNA to request the revised schedule, to which all of the parties have consented. ENDORSEMENT: Briefing schedule suspended until conference. (Signed by Judge Thomas P. Griesa on 12/10/2010) (lnl) (Entered: 12/10/2010)

01/13/2011	382	ENDORSED LETTER addressed to Judge Thomas P. Greisa from Dennis H. Hranitzky, dated 1/11/2011, re: We represent NML Capital, Ltd. ("NML") in the above-captioned actions and as directed by the Court at the end of the December 17, 2010 motion conference in these actions (the "Motion Conference"), write on behalf of NML and EM Ltd. (together "Plaintiffs"), nonparties the Bank for International Settlements and Jaime Caruana (together, the "BIS Nonparties"), nonparty Banco de la Nacion Argentina ("BNA"), nonparty Bank of America ("BofA") and defendant the Republic of Argentina (the "Republic") to propose a schedule for further briefing in connection with various discovery-related motions now pending in these actions. ENDORSEMENT: Approved. (Signed by Judge Thomas P. Griesa on 1/13/2011) (lnl) (Entered: 01/14/2011)
	* * *	

01/13/2011		Set Deadline as to 336 MOTION to Compel Non-Party Bank of America, N.A. to Comply with Subpoena. Plaintiffs' Reply Memorandum due by 3/1/2011. (lnl) (Entered: 01/14/2011)
01/19/2011	383	TRANSCRIPT of proceedings held on 12/17/10, 11:05 a.m. before Judge Thomas P. Griesa. Relates to 03-2507, 03-8845, 05-6200.(rjm) (Entered: 01/20/2011)
01/20/2011	384	SUPPLEMENTAL MEMORANDUM OF LAW *REGARDING MOTIONS TO QUASH AND COMPEL*. Document filed by NML Capital, Ltd.. (Cohen, Robert) (Entered: 01/20/2011)
01/20/2011	385	DECLARATION of ERIC C. KIRSCH. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B PT 1 OF 2, # 3 Exhibit B PT 2 OF 2, # 4 Exhibit C)(Cohen, Robert) (Entered: 01/20/2011)
01/20/2011	386	DECLARATION of ROSSANA SALARIS *IN SUPPORT OF PLAINTIFFS MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY BANK OF AMERICA, N.A. AND IN OPPOSITION TO MOTION TO*

		QUASH SUBPOENA. Document filed by NML Capital, Ltd.. (Cohen, Robert) (Entered: 01/20/2011)
01/20/2011	387	DECLARATION of CHARLES R. JACOB. Document filed by NML Capital, Ltd.. (Cohen, Robert) (Entered: 01/20/2011)
01/28/2011	388	DECLARATION of Eric C. Kirsch. Document filed by NML Capital, Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S)(Cohen, Robert) (Entered: 01/28/2011)
* * *		
02/10/2011	392	SUPPLEMENTAL MEMORANDUM OF LAW in Opposition re: 336 MOTION to Compel *Non-Party Bank of America, N.A. to Comply with Subpoena. and in further support of motion to quash*. Document filed by Bank of America, N.A.. (Glickman, Barry) (Entered: 02/10/2011)

02/10/2011	393	DECLARATION of Mark S. Sullivan in Opposition re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by Banco De La Nacion Argentina. (Attachments: # 1 Exhibit exhibit 1, # 2 Exhibit exhibit 2, # 3 Exhibit exhibit 3, # 4 Exhibit exhibit 4, # 5 Exhibit exhibit 5)(Sullivan, Mark) (Entered: 02/10/2011)
02/10/2011	394	MEMORANDUM OF LAW in Opposition re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by Banco De La Nacion Argentina. (Sullivan, Mark) (Entered: 02/10/2011)
02/10/2011	395	DECLARATION of Eduardo Alberto Barreira Delfino in Opposition re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by Banco De La Nacion Argentina. (Sullivan, Mark) (Entered: 02/10/2011)
02/10/2011	396	DECLARATION of Miguel Angel Mandrile in Opposition re: 365 MOTION to Compel *Banco de la Nacion Argentina to Produce Documents*.. Document filed by

		Banco De La Nacion Argentina. (Sullivan, Mark) (Entered: 02/10/2011)
	* * *	
02/10/2011	400	MEMORANDUM OF LAW */Supplemental Memorandum of Law of the Republic of Argentina in Support of Motions to Quash and in Opposition to Motions to Compel Subpoenas, Dated February 10, 2011.* Document filed by The Republic of Argentina. (Boccuzzi, Carmine) (Entered: 02/10/2011)
02/10/2011	401	DECLARATION of Rachel Goldbrenner , *Dated February 10, 2011.* Document filed by The Republic of Argentina. (Boccuzzi, Carmine) (Entered: 02/10/2011)
	* * *	
03/04/2011	412	REPLY MEMORANDUM OF LAW *regarding Motions to Quash and to Compel.* Document filed by EM Ltd., NML Capital, Ltd.. (Cohen, Robert) (Entered: 03/04/2011)
	* * *	
08/30/2011		Minute Entry for proceedings held before Judge Thomas P. Griesa: Oral Argument held on 8/30/2011. The Following discovery motions were all

		granted and should be closed: 03cv8845 #336 & #365; 05cv2434 #370; 06cv6466 #292; 07cv1910 #242; 07cv2690 #238; 07cv6563 #228; 08cv2541 #256; 08cv3302 #253; 08cv6978 #252; 09cv1707 #107; 09cv1708 #108. The following motions for reconsideration were denied and should be closed: 03cv8845 #435; 05cv2434 #434; 06cv6466 #355; 07cv1910 #305; 07cv2690 #307; 07cv6563 #293; 08cv2541 #317; 08cv3302 #314; 08cv6978 #328; 09cv1707 #180; 09cv1708 #181. (mro) (Entered: 09/02/2011)
* * *		
09/02/2011	442	OPINION: #100745 For the reasons stated on the record at the hearing on August 30, 2011, the court grants Plaintiffs motion to compel Bank of America and BNA to comply with the subpoenas, subject to modifications of details. The Court denies the Republic's motion to quash the subpoena served on Bank of America. The opinion resolves the motions listed as document numbers 306 and 365 in case 03 Civ. 8845, as well as the same motions in the related cases. (Signed by Judge Thomas P. Griesa on 9/2/2011)

		(rdz) Modified on 9/6/2011 (ajc). (Entered: 09/02/2011)
* * *		
09/30/2011	444	NOTICE OF APPEAL from 442 Opinion. Document filed by The Republic of Argentina. (nd) (Entered: 10/04/2011)
* * *		
10/04/2011	445	ORDER: On September 20, 2011, the Republic requested via letter that the court stay its ruling pending appeal and issue a certification pursuant to 28 U.S.C. § 1292(b). The Republic's requests are denied. (Signed by Judge Thomas P. Griesa on 10/4/2011) (jfe) (Entered: 10/04/2011)
* * *		

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Second Circuit
Lead Case No. 11-4065
[Member Case Nos. 11-4077; 11-4082; 11-4100; 11-4102; 11-4117; 11-4118; 11-4133; 11-4153; 11-4165; 11-4182]

NML Capital, Ltd. v. Republic of Argentina

10/06/2011	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Republic of Argentina, FILED. [411108] [11-4065]
10/06/2011	2	DISTRICT COURT ORDER, dated 09/02/2011, RECEIVED.[411120] [11-4065]
10/06/2011	3	ELECTRONIC INDEX, in lieu of record, FILED.[411127] [11-4065]
10/11/2011	7	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Republic of Argentina, FILED. Service date 10/11/2011 by CM/ECF.[414064] [11-4065]
10/11/2011	8	MOTION, to stay, to expedite appeal, on behalf of Appellant Republic of Argentina, FILED. Service date 10/11/2011 by CM/ECF. [414091] [11-4065]

10/14/2011	10	FORM D, on behalf of Appellant Republic of Argentina, FILED. Service date 10/14/2011 by CM/ECF.[418119] [11-4065]
10/14/2011	11	FORM C, on behalf of Appellant Republic of Argentina, FILED. Service date 10/14/2011 by CM/ECF.[418208] [11-4065]
10/14/2011	12	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/14/2011 by CM/ECF.[418234] [11-4065]
10/17/2011	13	OPPOSITION TO MOTION to stay [8],to expedite appeal [8], on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/17/2011 by CM/ECF. [418389][13] [11-4065]
10/17/2011	14	MOTION, to file oversized brief, on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/17/2011 by CM/ECF. [418636] [11-4065]
10/17/2011	17	CERTIFICATE OF SERVICE, for Form C and Form D, filed on October 14, 2011, on behalf of Appellant Republic of Argentina, FILED. Service date 10/14/2011 by CM/ECF.[419016] [11-4065]

10/17/2011	18	CERTIFICATE OF SERVICE, for Motion of NML Capital, Ltd. for Leave to file an Oversized Response, on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/17/2011 by CM/ECF. [419613] [11-4065]
10/17/2011	23	PAYMENT OF DOCKETING FEE, on behalf of Appellant Republic of Argentina, district court receipt # 12465400014, FILED. [420146] [11-4065]
10/18/2011	20	MOTION ORDER, granting motion to file oversized brief [14] filed by Appellee NML Capital, Ltd., by SLC, FILED. [420004][20] [11-4065]
10/18/2011	26	MOTION, to file oversized brief, on behalf of Appellant Republic of Argentina, FILED. Service date 10/18/2011 by CM/ECF. [420731] [11-4065]
10/18/2011	27	REPLY TO OPPOSITION [13], on behalf of Appellant Republic of Argentina, FILED. Service date 10/18/2011 by CM/ECF. [420736][27] [11-4065]
10/18/2011	28	NEW CASE MANAGER, Jason Wang, ASSIGNED. [420789] [11-4065]

10/18/2011	32	MOTION ORDER, referring motion to stay [8] and referring motion to expedite appeal [8] filed by Appellant Republic of Argentina, by SLC, FILED. [421071][32] [11-4065]
10/19/2011	36	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/19/2011 by CM/ECF. [422917] [11-4065]
10/19/2011	39	ARGUMENT/SUBMITTED NOTICE, to attorneys/parties, TRANSMITTED.[422928] [11-4065]
10/20/2011	41	ATTORNEY, Theodore B. Olson for NML Capital, Ltd., in case 11-4065 , [36], ADDED.[423847] [11-4065]
10/28/2011	44	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee NML Capital, Ltd., FILED. Service date 10/28/2011 by CM/ECF. [432660] [11-4065]
10/28/2011	45	ATTORNEY, Matthew McGill for NML Capital, Ltd., in case 11-4065 , [44], ADDED.[432770] [11-4065]
10/28/2011	46	LETTER, dated 10/28/2011, on behalf of Appellee NML Capital,

		Ltd., RECEIVED. Service date 10/28/2011 by CM/ECF.[432827] [11-4065]
10/28/2011	47	SCHEDULING NOTIFICATION, on behalf of Appellant Republic of Argentina, informing Court of proposed due date 11/18/2011, RECEIVED. Service date 10/28/2011 by CM/ECF.[432858] [11-4065]
10/28/2011	49	MOTION ORDER, granting motion to file oversized reply [26] filed by Appellant Republic of Argentina, FILED. [432904][49] [11-4065]
10/31/2011	53	LETTER, dated 10/31/2011, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 10/31/2011 by CM/ECF. [433322] [11-4065]
11/01/2011	60	MOTION ORDER, denying motion to stay [8] filed by Appellant Republic of Argentina; granting motion to expedite appeal [8] filed by Appellant Republic of Argentina, by RJM, PWH, FILED. [435569][60] [11-4065]
11/02/2011	61	EXPEDITED SCHEDULING ORDER re: Appellants brief due date as 11/15/2011. Joint Appendix due date as 11/15/2011. Appellee's brief due date as 12/01/2011.

		Appellant reply brief due date as 12/08/2011, FILED. [11-4065]
11/02/2011	65	ORDER, dated 11/01/2011, consolidating the following appeals 11-4065(L), 11-4077, 11-4082 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182, FILED.[435600]
11/02/2011	66	AMENDED CAPTION PAGE, as per consolidation order dated 11/2/2011, SENT.[435618] [11-4065]
11/02/2011	67	NEW CASE MANAGER, Jason Wang, ASSIGNED.[436148] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/02/2011	103	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[457765] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/04/2011	69	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee NML Capital, Ltd. in 11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182, FILED. Service date 11/04/2011 by CM/ECF. [439211] [11-4065, 11-4077, 11-4082, 11-

4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

11/04/2011	70	ATTORNEY, Theodore Olson, [69], in place of attorney Robert Cohen, SUBSTITUTED.[439291] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/04/2011	71	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee NML Capital, Ltd., FILED. Service date 11/04/2011 by CM/ECF. [439599] [11-4065]
11/07/2011	101	REQUEST FOR ARGUMENT CD, with fee, RECEIVED [457754] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/08/2011	72	LETTER, dated 11/08/2011, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 11/08/2011 by CM/ECF.[441987] [11-4065]
11/08/2011	73	LETTER, dated 11/08/2011, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 11/08/2011 by CM/ECF. [442002] [11-4065]

11/08/2011	104	A R G U M E N T C D , TRANSMITTED.[457766] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/09/2011	76	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Republic of Argentina, FILED. Service date 11/09/2011 by CM/ECF.[443318] [11-4065]
11/09/2011	77	LETTER, dated 11/09/2011, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 11/09/2011 by CM/ECF. [443333] [11-4065]
11/09/2011	78	DEFECTIVE DOCUMENT, acknowledgment and notice of appearance [76], on behalf of Appellant Republic of Argentina, FILED.[443367] [11-4065]
11/10/2011	80	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Republic of Argentina, FILED. Service date 11/10/2011 by CM/ECF.[444805] [11-4065]
11/10/2011	102	A R G U M E N T C D , TRANSMITTED.[457755] [11-4065, 11-4077, 11-4082, 11-4100,

		11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/10/2011	161	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[514762] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/15/2011	82	JOINT APPENDIX, volume(s) 1 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448052] [11-4065]
11/15/2011	83	JOINT APPENDIX, volume(s) 2 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448053] [11-4065]
11/15/2011	84	JOINT APPENDIX, volume(s) 3 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448054] [11-4065]
11/15/2011	85	JOINT APPENDIX, volume(s) 4 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448055] [11-4065]
11/15/2011	86	JOINT APPENDIX, volume(s) 5 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date

		11/15/2011 by CM/ECF.[448057] [11-4065]
11/15/2011	87	JOINT APPENDIX, volume(s) 6 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448058] [11-4065]
11/15/2011	88	JOINT APPENDIX, volume(s) 7 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448059] [11-4065]
11/15/2011	89	JOINT APPENDIX, volume(s) 8 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448060] [11-4065]
11/15/2011	90	JOINT APPENDIX, volume(s) 9 of 9, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448061] [11-4065]
11/15/2011	91	SPECIAL APPENDIX, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448062] [11-4065]
11/15/2011	92	BRIEF, on behalf of Appellant Republic of Argentina, FILED. Service date 11/15/2011 by CM/ECF.[448068] [11-4065]

11/16/2011	95	EXTRA PAPER COPIES, Joint Appendix, Vols. 1-9, & Special Appendix, on behalf of Appellant Republic of Argentina, RECEIVED.[448330] [11-4065]
11/17/2011	162	ARGUMENT CD, TRANSMITTED.[514763] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
11/18/2011	97	LETTER, dated 11/18/2011, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 11/18/2011 by CM/ECF. [451635] [11-4065]
11/18/2011	98	CORRECTED BRIEF, on behalf of Appellant Republic of Argentina, FILED. Service date 11/18/2011 by CM/ECF. [451638] [11-4065]
11/28/2011	100	LETTER, dated 11/28/2011, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 11/28/2011 by CM/ECF.[457055] [11-4065]
11/30/2011	163	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[515441] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

12/01/2011	110	BRIEF, on behalf of Appellee NML Capital, Ltd., FILED. Service date 12/01/2011 by CM/ECF. [461857] [11-4065]
12/01/2011	111	CORRECTED BRIEF, on behalf of Appellee NML Capital, Ltd., FILED. Service date 12/01/2011 by CM/ECF. [461861] [11-4065]
12/02/2011	112	MOTION, to supplement record on appeal, on behalf of Appellee NML Capital, Ltd., FILED. Service date 12/02/2011 by CM/ECF. [462375] [11-4065]
12/05/2011	117	MOTION ORDER, referring motion to supplement record on appeal to the merits panel [112] filed by Appellee NML Capital, Ltd., FILED. [463267][117] [11-4065]
12/06/2011	118	DEFECTIVE DOCUMENT, brief, [110], [111], on behalf of Appellee NML Capital, Ltd., FILED.[465268] [11-4065]
12/07/2011	120	BRIEF, on behalf of Appellee NML Capital, Ltd., FILED. Service date 12/07/2011 by CM/ECF. [465629] [11-4065]

12/07/2011	144	CURED DEFECTIVE BRIEF, [120], on behalf of Appellee NML Capital, Ltd., FILED.[477245] [11-4065]
12/08/2011	122	REPLY BRIEF, on behalf of Appellant Republic of Argentina, FILED. Service date 12/08/2011 by CM/ECF. [468356] [11-4065]
12/08/2011	123	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Carmine D Boccuzzi, Jr., Esq. for Appellant Republic of Argentina, FILED. Service date 12/08/2011 by CM/ECF. [468357] [11-4065]
12/09/2011	126	NEW CASE MANAGER, Jason Wang, ASSIGNED.[468601] [11-4102]
12/09/2011	127	LETTER, dated 12/09/2011, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 12/09/2011 by CM/ECF. [469425] [11-4065]
12/09/2011	128	REPLY BRIEF, on behalf of Appellant Republic of Argentina, FILED. Service date 12/09/2011 by CM/ECF. [469426] [11-4065]
12/12/2011	132	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Theodore B. Olson, Esq.

for Appellee NML Capital, Ltd., FILED. Service date 12/12/2011 by CM/ECF. [470706] [11-4065]

12/12/2011 133 MOTION, to file document, on behalf of Appellant Republic of Argentina, FILED. Service date 12/12/2011 by CM/ECF. [470739] [11-4065]

12/12/2011 134 OPPOSITION TO MOTION to supplement record on appeal [112], on behalf of Appellant Republic of Argentina, FILED. Service date 12/11/2011 by CM/ECF. [470760][134] [11-4065]

12/12/2011 164 ARGUMENT CD, TRANSMITTED.[515443] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

12/13/2011 139 MOTION ORDER, granting motion to file correct reply brief[133] filed by Appellant Republic of Argentina, FILED. [471697][139] [11-4065]

12/13/2011 140 CORRECTED REPLY BRIEF, on behalf of Appellant Republic of Argentina, FILED. Service date 12/13/2011 by CM/ECF. [471787] [11-4065]--[Edited 12/13/2011 by JW]

12/15/2011	142	CASE CALENDARING, for the week of 02/06/2012, A , PROPOSED.[474053] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
12/19/2011	143	REPLY TO OPPOSITION [134], on behalf of Appellee NML Capital, Ltd., FILED. Service date 12/19/2011 by CM/ECF. [477188] [143] [11-4065]
01/03/2012	147	LETTER, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 01/03/2012 by CM/ECF.[487475] [11-4065]
01/05/2012	149	LETTER, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 01/05/2012 by CM/ECF.[489970] [11-4065]
01/09/2012	153	ARGUMENT, as early as the week of 02/21/2012, READY.[492115] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
01/13/2012	154	CASE CALENDARING, for the week of 02/27/2012, PROPOSED. [496978] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

01/17/2012	156	LETTER, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 01/17/2012 by CM/ECF.[499555] [11-4065]
01/17/2012	158	ARGUMENT, as early as the week of Case heard no earlier than the week of 03/12/2012, READY. [499625] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
02/15/2012	165	LETTER, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 02/15/2012 by CM/ECF.[526406] [11-4065]
02/16/2012	167	LETTER, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 02/16/2012 by CM/ECF.[528257] [11-4065]
02/22/2012	171	CASE CALENDARING, for the week of 04/23/2012, PROPOSED. [531554] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
02/27/2012	172	LETTER, on behalf of Appellee NML Capital, Ltd., RECEIVED. Service date 02/27/2012 by CM/ECF.[536699] [11-4065]

03/13/2012	175	CASE CALENDARING, for argument on 04/23/2012, SET.[550338] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
03/19/2012	176	ARGUMENT/SUBMITTED NOTICE, to attorneys/parties, TRANSMITTED.[555380] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
03/20/2012	177	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Republic of Argentina, FILED. Service date 03/20/2012 by CM/ECF. [556543] [11-4065]
03/27/2012	178	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee NML Capital, Ltd., FILED. Service date 03/27/2012 by CM/ECF. [563344] [11-4065]
03/28/2012	179	**REVISED** ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[564440] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
03/28/2012	180	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Republic of Argentina,

		FILED. Service date 03/28/2012 by CM/ECF. [564847] [11-4065]
04/02/2012	181	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee NML Capital, Ltd., FILED. Service date 04/02/2012 by CM/ECF. [567812] [11-4065]
04/23/2012	183	CASE, before JMW, JMCL, JAC*, C.JJ., HEARD.[589361] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
04/23/2012	184	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[596552] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
04/25/2012	186	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[596564] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
04/26/2012	188	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[596568] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
05/02/2012	185	ARGUMENT CD, TRANSMITTED.[596553] [11-4065, 11-4077, 11-4082, 11-4100,

		11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
05/02/2012	187	A R G U M E N T C D , TRANSMITTED.[596565] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
05/02/2012	189	A R G U M E N T C D , TRANSMITTED.[596569] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
05/08/2012	190	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[607791] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
05/11/2012	191	A R G U M E N T C D , TRANSMITTED.[607792] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
06/12/2012	193	FRAP 28(j) LETTER, dated 06/12/2012, on behalf of Appellant Republic of Argentina, RECEIVED. Service date 06/12/2012 by CM/ECF.[635083] [11-4065]
06/18/2012	195	FRAP 28(j) LETTER, dated 06/18/2012, on behalf of Appellee NML Capital, Ltd., RECEIVED.

		Service date 06/18/2012 by CM/ECF.[639625] [11-4065]
08/20/2012	198	NEW CASE MANAGER, Yana Segal, ASSIGNED.[696611] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
08/20/2012	199	OPINION, affirming the district court's order, by JMW., JMcL., JAC., FILED.[696642] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
08/20/2012	200	MOTION ORDER, denying motion to supplement record on appeal [112] filed by Appellee NML Capital, Ltd. in 11-4065, in light of opinion filed on 08/20/2012, by JMW., JMcL., JAC., FILED. [696658][200] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
08/20/2012	203	JUDGMENT, FILED.[697390] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
08/31/2012	204	ITEMIZED BILL OF COSTS, on behalf of Appellee NML Capital, Ltd., FILED. Service date

		08/31/2012 by CM/ECF.[708877] [11-4065]
09/04/2012	207	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Republic of Argentina, FILED. Service date 09/04/2012 by CM/ECF.[710434] [11-4065]
09/05/2012	208	ERRATA SHEET, for Opinion dated 08/20/2012, by John M. Walker, Jr., FILED.[710844] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
10/10/2012	211	ORDER, petition for rehearing en banc denied, FILED.[742715] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
10/17/2012	212	JUDGMENT MANDATE, ISSUED.[749323] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
10/23/2012	215	STATEMENT OF COSTS, on behalf of Appellee NML Capital, Ltd. in 11-4065, FILED.[754650] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

10/23/2012	216	CERTIFIED ORDER, dated 10/23/2012, to SDNY (NEW YORK CITY), ISSUED.[754662] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
01/15/2013	217	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 01/07/2013, U.S. Supreme Court docket # 12 842, RECEIVED.[816178] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]
01/14/2014	218	U.S. SUPREME COURT NOTICE, dated 01/10/2014, U.S. Supreme Court docket # 12-842, stating the petition for writ of certiorari is granted, RECEIVED.[1132948] [11-4065, 11-4077, 11-4082, 11-4100, 11-4102, 11-4117, 11-4118, 11-4133, 11-4153, 11-4165, 11-4182]

[United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG, [R.307], Declaration of Carmine Boccuzzi, with Exhibits A-Q in Support re: 306 Motion to Quash / Notice of Motion to Quash Subpoena (May, 17, 2010)]

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)
07 Civ. 2690 (TPG)
07 Civ. 6563 (TPG)
08 Civ. 2451 (TPG)
08 Civ. 3302 (TPG)
08 Civ. 6978 (TPG)

[Dated March 10, 2010]

NML CAPITAL, LTD.,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE REPUBLIC OF ARGENTINA,	)
	)
Defendant.	)
	)

NOTICE OF SUBPOENA IN A CIVIL CASE

TO: Jonathan I. Blackman, Esq.
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006

PLEASE TAKE NOTICE that, pursuant to Rules 30(b) and 45 of the Federal Rules of Civil Procedure, Plaintiff, by its attorneys Miller & Wrubel P.C., has issued the attached subpoena commanding the production of certain documents by, and will cause such subpoena to be served upon:

Bank of America N.A.
One Bryant Park
New York, New York 10036

Dated: New York, New York
March 10, 2010

MILLER & WRUBEL P.C.

By: /s/Charles R. Jacob III
Joel M. Miller
Charles R. Jacob III
Haynee C. Kang
570 Lexington Avenue
New York, New York 10022
(212) 336-3500
Attorneys for Plaintiff
NML Capital, Ltd.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)
07 Civ. 2690 (TPG)
07 Civ. 6563 (TPG)
08 Civ. 2451 (TPG)
08 Civ. 3302 (TPG)
08 Civ. 6978 (TPG)

[Dated March 10, 2010]

NML CAPITAL, LTD.,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE REPUBLIC OF ARGENTINA,	)
	)
Defendant.	)
	)

SUBPOENA DUCES TECUM IN A CIVIL CASE

To: Bank of America N.A.
One Bryant Park
New York, New York 10036

YOU ARE COMMANDED, pursuant to Rules 34(c) and 45 of the Federal Rules of Civil Procedure, to produce for inspection and copying at the offices of Miller & Wrubel P.C., 570 Lexington Avenue, New York, New York 10022, attention Haynee Kang, on or

before April 12, 2010 at 10:00 a.m., all Documents specified in Schedule A, according to the definitions and instructions stated therein.

This subpoena has been issued by the United States District Court for the Southern District of New York. Your failure to produce Documents as described in this subpoena may be punished as a contempt of court.

Pursuant to the requirements of Rule 45(a)(1)(iv) of the Federal Rules of Civil Procedure, the text of Rule 45(c) and (d) of the Federal Rules of Civil Procedure is reproduced below.

Dated: New York, New York
March 10, 2010

MILLER & WRUBEL P.C.

By: /s/Charles R. Jacob III

Joel M. Miller
Charles R. Jacob III
Haynee C. Kang
570 Lexington Avenue
New York, New York 10022
(212) 336-3500

Attorneys for Plaintiff NML Capital, Ltd.

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) Protecting a Person Subject to a Subpoena.
(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.
(2) *Command to Produce Materials or Permit Inspection.*
(A) *Appearance Not Required.* A person commanded to produce Documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
(B) *Objections.* A person commanded to produce Documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
(ii) ensures that the subpoenaed person will be reasonably compensated.
(d) Duties in Responding to a Subpoena.
(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing Documents or electronically stored information:
(A) *Documents.* A person responding to a subpoena to produce Documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.
(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause,

considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld Documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified, and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

SCHEDULE A

Definitions

1. "**Argentina**" refers to the defendant in each of these actions, the Republic of Argentina, Argentina's agencies, ministries, instrumentalities, political subdivisions, employees, attorneys, representatives, affiliates, subsidiaries, predecessors, successors, alter-egos, and assigns, and all other Persons acting or purporting to act for or on Argentina's behalf, whether or not authorized to do so. "Argentina" includes all Persons listed in Exhibit 1 attached hereto.

2. "**Document**", "**Documents**", or "**Documentation**" means all written, recorded or graphic material, however produced or reproduced, in Your actual or constructive possession, custody or control, including Documents accessible at Your request, as defined in Federal Rule of Evidence 1001, Federal Rule of Civil Procedure 34(a), and Local Rule 26.3, inclusively, and shall include, without limitation, the following: the original and all copies of all drafts or written or printed material, graphs, charts, photographs, records, audio or video tapes, and "Electronically Stored Information," as defined below.

3. "**Electronically Stored Information**" ("**ESI**") means, without limitation, the following:

a) information that is generated, received, processed, and recorded, and/or maintained by or in computers, databases, systems, network drives, shared spaces, external and removable media, and other electronic devices and sources, including, without limitation, voicemail, email, Instant

Messaging systems, and transaction processing, and ledger systems;

b) internal or external websites and other shared spaces;

c) output resulting from the use of any software program, database, or other system, including, including, without limitation, word processing Documents, spreadsheets, database files, charts, graphs and outlines, electronic mail, SWIFT portal, AOL Instant MessengerTM (or similar programs) or bulletin board programs, operating systems, source code, PRF files, PRC files, batch files, ASCII files, and all miscellaneous media on which they reside and regardless of whether said electronic data exists in an active file, a deleted file, or file fragment;

d) activity listings of electronic mail receipts and/or transmittals; and any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, flash memory, thumb drives, memory sticks, and related media used to move and store data, such as, but not limited to, a personal digital assistant, *e.g.*, Palm Pilot, Blackberry, or similar device, and file folder tabs, or containers and labels appended to, or relating to, any physical storage device associated with each original or copy of all Documents requested herein; and

e) archived data, legacy data, and back-up tapes.

4. **"Person"** includes all natural persons and any business, legal or governmental entity, corporation, company or association.

5. **"Relating to"** mean directly or indirectly, in whole or in part, concerning, constituting, evidencing, recording, reflecting, substantiating, describing, summarizing, identifying, or referring to in any way.

6. **"Relevant Time Period"** means January 1, 2009 through and including the date on which You produce Documents responsive to this subpoena.

7. **"SWIFT"** means the Society for World Interbank Financial Telecommunication.

8. **"You"** or **"Your"** means Bank of America, N.A., its agents, instrumentalities, employees, attorneys, representatives, affiliates, subsidiaries, predecessors, successors, alter-egos, and assigns, and all other Persons acting or purporting to act for or on Bank of America, N.A.'s behalf, whether or not authorized to do so.

9. **"IT"** means information technology.

Instructions

1. Documents referred to herein shall include all portions, or pages of each Document referred to and all attachments, enclosures, appendices and supporting Documentation, and including, without limitation, working papers, routing slips, handwritten notes and similar materials (with or without notes or changes therein).

2. A Document is deemed to be in Your actual or constructive possession, custody or control if it is in Your physical custody or if it is in the physical custody of any other Person and You (a) have a right, by control, contract, statute, order or otherwise, to use inspect, examine or copy such Documents on any terms; (b) have an understanding, express or implied, that You may use, inspect, examine or copy such Documents upon any terms; or (c) have, as a practical matter, been able to use, inspect, examine or copy such Document when You sought to do so. Such other Persons include record retention vendors, and technology, data, or other 3rd party IT, cloud or other service providers.

3. Pursuant to Definition 1, "Argentina" shall be construed to refer to the Republic of Argentina and all Persons listed in Exhibit 1 attached hereto. The Persons listed in Exhibit 1 include names of actual people and entities, and known aliases thereof. You must search all databases and transactional systems to which You have possession, custody or control that would contain the records sought for such Persons. The searches conducted on these sources of information shall include the Persons listed in Exhibit 1, as well as likely variations on the names of those Persons, in both English and Spanish translation.

4. ESI should be produced in the native form in which it is regularly maintained or a format agreed upon with the party serving this subpoena, along with relevant database schema and textual descriptions sufficient to understand how to interpret the data produced. Database schema and textual descriptions include, for example: system and user manuals, record

layouts, entity relationship diagrams, and lookup tables for keys and codes. Authentication of ESI produced in its native format, such as MD5 hash coding, shall be provided where possible.

5. If production in native format is impossible or impracticable, ESI may be produced in non-proprietary format, such as such as .csv, .jpg, .tif, or .pdf, or other agreed upon format, at the highest resolution available along with the metadata normally contained within such Documents, and the necessary Concordance or Introspect load files. If such metadata is not available, each Document shall either (a) be accompanied with objective coding of all file properties relating to such Document, including, but not limited to, all information relating to the date(s) the Document was last accessed, created, modified or distributed, and the author(s) and recipient(s) of the Document, or (b) be produced with optical character recognition ("OCR") data. Documents produced in non-proprietary format shall be produced with OCR data. Image data of items associated with specific transactions (e.g., checks, deposits) should be (a) produced in individual graphic data files with any associated endorsements, and (b) linked to files with any corresponding text data by a unique identifier so the text and image files may be properly associated.

6. Documents in large or complex formats, such as large Excel-format spreadsheets or accounting databases, for which non-proprietary format imaging would alter the presentation of the data, should be produced in their native format.

7. For each data file provided, You should separately provide a control file listing the total number of records contained in each data file.

8. Under no circumstances should ESI be converted from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome to use. ESI should not be produced in a form that removes or significantly degrades the ability to search the ESI by electronic means where the ESI is ordinarily maintained in a way that makes it searchable by electronic means.

9. ESI may be transmitted in an encrypted container. Decryption keys should be provided separately at the time the data is produced.

10. If You decline to search or produce ESI on the ground that such ESI is not reasonably accessible because of undue burden or cost, identify such information by category or source and provide detailed information regarding the burden of cost You claim is associated with the search or production of such ESI.

11. Documents, other than ESI, shall be produced as they are kept in the usual course of business or organized and labeled to correspond to the categories in this request. All Documents shall be produced in the file folder, envelope or other container in which the Documents are kept or maintained by You. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

12. If any requested Document is not or cannot be produced in full, You are requested to produce such Document to the extent possible, indicating which Document, or portion of that Document is being withheld, and the reason that portion of the Document is being withheld.

13. In producing Documents, You are requested to produce each Document requested together with all non-identical copies and drafts of that Document. If the original of any Document cannot be located, a copy shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

14. In the event that any of the Documents requested herein have been lost or destroyed, You shall: (a) furnish a list identifying each such Document, its author and addressee; (b) identify each person to whom copies of the Documents were furnished or to whom the contents thereof were communicated; (c) provide a summary of the substance of the Document; (d) provide the date upon which the Document was lost or destroyed; and (e) if destroyed, state the reason the Document was destroyed.

15. If a privilege is claimed as the basis for objection to producing any Document, You shall: (a) state the nature of the privilege claimed; (b) state the date of such Document; (c) identify the person who prepared such Document; (d) identify the person(s) to whom the Document was directed or circulated; (e) identify the person(s) who has custody of such Document or a copy of such Document; (f) state any and all facts and reasons that You claim support each objection; (g) state the reason(s) for the preparation of the Document; (h) identify each person(s) who has knowledge of any of the facts or reasons that You claim support such objection; and (i) provide all information relating thereto which is not within the scope of the privilege claimed.

16. The words "all" and "each" shall be construed as "all and each." "Any" includes the word "all," and "all" includes the word "any."

17. "And" or "or" shall be construed disjunctively or conjunctively as necessary to make the request inclusive rather than exclusive.

18. The plural of any word used herein includes the singular and the singular includes the plural. The masculine gender of any word used herein includes the feminine and vice versa. The past tense of a verb used herein includes the present tense and the present tense includes the past tense.

19. This request shall be deemed continuing so as to require further and supplemental production if, between the date hereof and the time of hearing or trial, any additional Documents responsive to this request come into Your possession, custody or control (as defined above).

Documents You Are Required To Produce

1. Documents sufficient to identify all accounts maintained with You at anytime during the Relevant Time Period in the name Argentina, beneficially held in whole or in part by Argentina, or for which Argentina is a signatory.

2. All account opening Documentation, including (if applicable) all Documents evidencing signatories, stated purpose, and source of funds for all accounts identified in response to Document Request 1.

3. All account or Customer information as maintained, for example, in a Customer Relationship

Management (CRM) or customer information file including at a minimum any linked or related accounts, all account beneficiaries, agents, guarantors, and customers for any accounts identified in response to Document Request 1.

4. Current Account balance, currency and as-of date for all accounts identified in Document Request 1.

5. Documents sufficient to identify how long all accounts identified in response to Document Request 1 have been active.

6. Documents relating to the closure (including the party initiating the closure) for all accounts identified in Document Request 1 that have been closed during the Relevant Time Period.

7. Transaction history for the Relevant Time Period for all accounts identified in response to Document Request 1.

8. Documents evidencing transaction activity in all identified accounts, including all reports used to monitor compliance with Bank Secrecy Act (BSA); Anti-Money Laundering (AML); or Office of Foreign Assets Control (OFAC) reporting requirements for all accounts identified in Document Request 1.

9. Documents relating to all SWIFT messages, including but not limited to MT100, MT200 and MT700 message types, received or transmitted during the Relevant Time Period relating to transactions conducted through Your SWIFT portal identifying Argentina as the beneficiary, originator or any other related party to a transaction.

10. Documents relating to all commercial or standby letters of credit in which Argentina is listed as the applicant or beneficiary, including but not limited to invoices and bills of lading related to the letter of credit.

11. All Documents relating to outstanding loans for which Argentina is listed as the borrower or guarantor, including but not limited to information regarding the purpose of the loan and all collateral that was used to secure the loan.

12. Each asset or property of any kind whatsoever which Argentina owned directly or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially, including without limitation as a partner, general or limited, limited liability member, fiduciary, and as an equity or debt holder, or demand deposit holder.

Exhibit 1: Persons Falling Under the Definition of "Argentina"

I. Ministries, Secretariats, Ministers and Secretaries

Oficina (Spanish)	Office (English)	Ministers, Secretaries, Other Officials
Presidencia de la Nacion	**Presidency of the Nation**	Cristina Fernandez de Kirchner
		Nestor Carlos Kirchner
Vicepresidente	Vice-President	Ing. Julic Cesar Cleto Cobos
Secretarías de Estado	**Departments of State**	
Secretaría General	Secretary General	Oscar Parrilli
Subsecretaría General	Under-Secretary General	Gustavo López
Subsecretaría de Coordinación	Under-Secretary for Coordination	(unfilled)
Secretaría de Inteligencia	Secretary of Intelligence	Héctor Icazuriaga
Secretaría Legal y Tecníca	Secretary for Legal and Technical Affairs	Carlos Alberto Zannini

Secretaría de Programación para la Prevención de la Drogadicción y la Lucha contra el Narcotráfico	Secretary for Planning for the Prevention of Drug Addiction and the Fight Against Drug Trafficking	José Ramón Granero
Secretaría de Cultura	Secretary of Culture	Jorge Coscia
Unidad de Planificación y Evaluación de la Educación	Office for Educational Planning and Evaluation	Prof. Juan Carlos Tedesco
Casa Militar	Military Headquarters	(unfilled)
Consejo Nacional de Coordinación de Políticas Sociales	National Coordinating Council for Social Policies	Dra. Alicia Margarita Kirchner
Jefatura de Gabinete de Ministros	**Office of the Cabinet Chief**	
Jefe de Gabinete	Cabinet Chief	Aníbal Domingo Fernández.
Subsecretaría de Coordinación y Evaluación Presupuestaria	Under-Secretary for Budgetary Coordination and Evaluation	(unfilled)

Secretaría de Gestión Pública	Secretary for Public Management	Juan Manuel Abal Medina
Secretaría de Gabinete y Relaciones Parlamentarias	Secretary for the Cabinet and Parliamentary Relations	Oscar Roberto González
Subsecretaría de Relaciones Institucionales	Under-Secretary for Institutional Relations	Juan José Amondarain
Subsecretaría de Reforma Institucional y Fortalecimiento de la Democracia	Under-Secretary for Institutional Reform and the Strengthening of Democracy	Marta Angélica Oyhanarte
Secretaría de Medios de Comunicación	Secretary of Communication	Enrique Raúl Albistur
Subsecretaría de Gestión de Medios	Under-Secretary for Management of Media	Juan Ross
Subsecretaría de Comunicación	Under-Secretary for Communications	Alfredo Scoccimarro
Subsecretaría de Comunicación Estratégica	Under-Secretary for Strategic Communication	(unfilled)
Secretaría de Ambiente y Desarrollo Sustentable	Secretary for the Environment and Sustainable Development	Homero Bibiloni

Subsecretaría de Coordinación de Políticas Ambientales	Under-Secretary for Coordination of Environmental Policies	Fernando C. Melillo
Delegación Técnico Administrativa	Office of Technical Administration	Walter Guillermo Romero
Subsecretaría de Planificación de Política Ambiental	Under-Secretary for Planning and Environmental Policy	Ing. Sergio La Rocca
Subsecretaría de Promoción del Desarrollo Sustentable	Under-Secretary for Promotion of Sustainable Development	Dr. Ricardo Eusebio Rodriguez
Subsecretaría de Control y Fiscalización Ambiental y Prevención de la Contaminación	Under-Secretary for Environmental Control and the Pollution Prevention	Dr, Nestor Cafferatta
Ministerio del Interior	**Ministry of the Interior**	
Ministro	Minister	Aníbal Florencio Randazzo
Secretaría de Provincias	Secretary for the Provinces	José Luis Barbier

Secretaría de Asuntos Políticos y Electorales	Secretary for Political and Electoral Affairs	Luis Eduardo Di Rocco
Secretaría de Asuntos Municipales	Secretary for Municipal Affairs	Raquel Cecilia Kismer de Olmos
Secretaría de Interior	Secretary of Interior	Marcio Barbosa Moreira
Subsecretaría de Coordinación	Under-Secretary for Coordination	María de Lourdes Giménez
Dirección Nacional de Migraciones	National Director for Migration	Martín Arias Duval
Dirección Nacional del Registro Nacional de las Personas	Director for National Personal Records Office	Mora Arqueta
Ministerio de Relaciones Exteriores, Comercio Internacional y Culto	**Ministry of Foreign Affairs, International Trade and Religious Affairs**	
Ministro	Minister	Jorge Taiana
Secretaría de Relaciones Exteriores	Secretary of Foreign Relations	Ambassador Victorio José Taccetti

Subsecretaría de Relaciones Institucionales	Under-Secretary for Institutional Relations	(unfilled)
Subsecretaría de Política Latinoamericana	Under-Secretary for Latin American Policy	Ambassador Agustin Miguel Colombo Sierra
Subsecretaría de Política Exterior	Under-Secretary for Foreign Policy	(unfilled)
Secretaría de Comercio y Relaciones Económicas Internacionales	Secretary for Commerce and International Economic Relations	Ambassador Alfredo Vicente Chiaradia
Subsecretaría de Comercio Internacional	Under-Secretary for International Trade	Ambassador Luis María Kreckler
Subsecretaría de Integracíon Económica Americana y Mercosur	Under-Secretary for Economic Integration of the Americas and Mercosur	Ambassador Eduardo Alberto Sigal
Subsecretaría de Coordinación y Cooperación Internacional	Under-Secretary for Coordination and International Cooperation	Ambassador Rodolfo María Ojea Quintana
Subsecretaría Legal, Tecníca y Administrativa	Under-Secretary for Legal, Technical and Administrative Affairs	Ambassador Hernán Darío Orduna

Secretaría de Culto	Secretary for Religious Affairs	Ambassador Guillermo Rodolfo Oliveri
Subsecretaría de Culto	Under-Secretary for Religious Affairs	Ambassador Juan Laureano Fabian Landaburu
Ministerio de Defensa	**Ministry of Defense**	
Ministro	Minister	Nilda Garré
Jefe de Gabinete	Cabinet Chief	Raúl Garré
Subsecretaría de Coordinación	Under-Secretary for Coordination	Hugo T. Cormick
Secretaría de Asuntos Internacionales de la Defensa	Secretary for International Defense Affairs	Alfredo Waldo Forti
Secretaría de Planeamiento	Secretary for Planning	Oscar Julio Cuattromo
Secretaría de Estrategía y Asuntos Militares	Secretary for Strategy and Military Affairs	Gustavo Sibilla
Unidad Auditoria Interna	Internal Audit Unit	Jorge D. Arguello
Dirección de Comunicación Social	Social Communication Directorate	Jorge Bernetti

Dirección Nacional de Inteligencia Estratégica Militar	National Strategic Military Intelligence Directorate	Carlos Aguilar
Ministerio de Economía y Finanzas Públicas	**Ministry of Economy and Public Finance**	
Ministro	Minister	Amado Boudou
Secretaría de Política Económica	Secretary for Economic Policy	Roberto Feletti
Subsecretaría de Programación Económica	Under-Secretary for Economic Planning	Hugo Andrade
Secretaría de Comercio Interior	Secretary for Domestic Commerce	Guillermo Moreno
Subsecretaría de Defensa del Consumidor	Under-Secretary for Consumer Protection	Pimpi Colombo
Secretaría de Finanzas	Secretary of Finance	Hernán Lorenzino
Subsecretaría de Financiamiento	Under-Secretary for Finance	Adrián Cosentino
Subsecretaría de Servicios Financieros	Under-Secretary for Financial Services	Juan Manuel Prada
Secretaría de Hacienda	Secretary of Treasury	Juan Carlos Pezoa

Secretaría Legal y Administrativa	Secretary for Legal and Administrative Affairs	Ofelia Cédola
Coordinadora de Ceremonial	Coordinator for Protocol	Raquel Melgin
Ministerio de Planificacíon Federal Inversión Pública y Servicios	**Ministry of Federal Planning, Public Investment and Services**	
Ministro	Minister	Julio Miguel De Vido
Subsecretaría de Planificación Territorial de la Inversión Pública	Under-Secretary of Territorial Planning for Public Investment	Graciela Oporto
Secretaría de Obras Públicas	Secretary for Public Works	José Francisco López
Subsecretaría de Coordinación de Obra Pública Federal	Under-Secretary for Coordination of Federal Public Works	Carlos Santiago Kirchner
Subsecretaría de Desarrollo Urbano y Vivienda	Under-Secretary for Urban Development and Housing	Luis Alberto Bontempo
Subsecretaría de Obras Públicas	Under-Secretary of Public Works	Hugo Manuel Rodriguez

Subsecretaría de Recursos Hídricos	Under-Secretary for Water Resources	José Fabian Lopez
Secretaría de Minería	Secretary of Mining	Jorge Omar Mayoral
Secretaría de Energía	Secretary of Energy	Daniel Cameron
Subsecretaría de Energía Eléctrica	Under-Secretary for Electric Power	Ing. Luis Alberto Beuret
Subsecretaría de Combustibles	Under-Secretary for Fuels	(unfilled)
Secretaría de Comunicacíon	Secretary of Communications	Carlos Lisandro Salas
Secretaría de Transporte	Secretary of Transportation	Juan Pablo Schiavi
Subsecretaría de Puertos y Vias Navegables	Under-Secretary for Ports and Navigable Waterways	Ricardo Lujan
Subsecretaría de Transporte Aerocomercial	Under-Secretary of Commercial Air Transport	Juan Pablo Schiavi
Subsecretaría de Transporte Automotor	Under-Secretary of Automotive Transport	Jorge Gonzalez
Subsecretaría de Transporte Ferroviario	Under-Secretary of Rail Transport	Guillermo Antonio Luna

Subsecretaría de Coordinàtion y Control de Gestión	Under-Secretary for Coordination and Supervision of Management	Roberto Baratta
Subsecretaría Legal	Under-Secretary for Legal Affairs	Rafael Enrique Llorens
Ministerio de Justicia, Seguridad y Derechos Humanos	**Ministry of Justice, Security and Human Rights**	
Ministro	Minister	Julio Alak
Subsecretaría de Coordinacíon e Innovacíon	Under-Secretary for Coordination and Innovation	José Lucas Gaincerain
Secretaría de Asuntos Registrales	Secretary for Registration Affairs	Ricardo Eusebio Rodríguez
Secretaría de Seguridad Interior	Secretary for Domestic Security	Héctor Masquelet
Secretaría de Derechos Humanos	Secretary for Human Rights	Eduardo L. Duhalde
Secretaría de Justicia	Secretary for Justice	Marcela M. Losardo
Subsecretaría de Politica Criminal y Asuntos Penitenciarios	Under-Secretary for Criminal Policy and Penitentiary Affairs	Eduardo E. Descalzo

Ministerio de Educacíon	**Ministry of Education**	
Ministro	Minister	Alberto Estanislao Sileoni
Secretaría de Educacíon	Secretary for Education	María Inés Abrile de Vollmer
Secretaría de Políticas Universitarias	Secretaru for University Policy	Alberto R. Dibbern
Secretaría del Consejo Federal de Educación	Secretary for the Federal Council on Education	Domingo de Cara
Ministerio de Ciencia, Tecnología e Innovación Productiva	**Ministry of Science, Technology and Production Innovation**	
Ministro	Minister	Lino Barañao
Subsecretaría de Coordinacíon Administrativa	Under-Secretary for Administrative Coordination	Rodolfo Ariel Blasco
Directora Nacional de Relaciones Internacionales	National Director for International Relations	Agueda Suarez Porto de Menvielle

Secretaría de Planeamiento y Políticas de Ciencia, Tecnología e Innovación Productiva	Secretary for Planning and Science, Technology and Production Innovation Policies	Ruth Ladenheim
Subsecretaría de Políticas de Ciencia, Tecnología e Innovación Productiva	Under-Secretary for Science, Technology and Production Innovation Policies	Lidia Rodríguez
Subsecretaría de Estudios	Under-Secretary for Studies	Guillermo Venturuzzi
Secretaría de Articulación Cientifico Tecnológica	Secretary for Technological Scientific Coordination	Alejandro Ceccatto
Subsecretaría de Coordinacíon Institucional	Under-Secretary for Institutional Coordination	Mario Lattuada
Subsecretaría de Evaluación Institucional	Under-Secretary for Institutional Evaluation	María Cristina Cambiaggio
Ministerio de Labor, Empleo y Seguridad Social	**Ministry of Labor, Employment and Social Security**	
Ministro	Minister	Carlos Tomada

Subsecretaría de Coordinacíon	Under-Secretary for Coordination	José Horacio Ordeix
Subsecretaría de Programación Técnica e Estudios Laborales	Under-Secretary t for Technical Planning and Labor Studies	Marta S. Novick
Secretaría de Trabajo	Secretary of Labor	Noemí Rial
Secretaría de Seguridad Social	Secretary for Social Security	Walter Arrighi
Secretaría de Empleo	Secretary for Employment	Adolfo Enrique Deibe
Ministerio de Salud	**Ministry of Health**	
Ministro	Minister	Juan Luis Manzur
Secretaría de Politica, Regulación y Relaciones e Institutos	Secretary for Policy, Regulation and Institutes	Fernando Avellaneda
Secretaría de Promoción y Programas Sanitarios	Secretary for Campaigns and Health Programs	Mximo Andres Diosque

Ministerio de Desarrollo Social	**Ministry of Social Development**	
Ministro	Minister	Alicia Kirchner
Secretaría de Gestión y Articulación Institucional	Secretary for Management and Institutional Organization	Inés del Carmen Páez D'Alessandro
Secretaría de Políticas Sociales y Desarrollo Humano	Secretary for Social Policies and Human Development	Roberto Conrado Ghetti
Secretaría de Deportes	Secretariat for Sports	Claudio Alberto Morresi
Ministerio de Industría y Turismo	**Ministry of Industry & Tourism**	
Ministro	Minister	Débora Giorgi
Secretaría de Turismo	Secretary of Tourism	Carlos Enrique Meyer
Secretaría de la Industría, Comercio y la Pequeña y Mediana Empresa (PyME)	Secretary of Industry, Commerce and Small and Medium-Sized Enterprises	Eduardo Dante Bianchi

Ministerio de Agricultura, Ganadería y Pesca	**Ministry of Agriculture, Stockbreeding and Fisheries**	
Ministro	Minister	Julián Andrés Dominguez
Secretaría Relaciones Institucionales	Secretary of Institutional Relations	Fabiana Garcí
Secretaría Desarrollo Rural y Agricultura Familiar	Secretary of Rural Development and Family Farms	Carla Campos Bilbao
Secretaría Agricultura, Ganadería, and Fisheries	Secretary for Agriculture, Stockbreeding and Fisheries	Lorenzo Ricardo Basso
Surbsecretaría de Pesca y Agricultura	Under-Secretary for Fisheries and Agriculture	Norberto Yauhar
Subsecretaría de Coordinacíon Técnica y Administrativa	Under-Secretary for Technical and Administrative Coordination	Mateo Baldarenas
Subsecretaría de Ganadería	Under-Secretary for Stockbreeding	Alejandro Lotti
Subsecretaría de Coordinación Institucional	Under-Secretary for Institutional Coordination	Adrián Mircovich

Banco Central de la República Argentina (BCRA)	Central Bank of the Republic of Argentina (BCRA)	Martín Redrado Mercedes Marco del Pont Hugo Carlos Alvarez Dr. Adrian Esteban Cosentino Gabriela Ciganotto Carlos Domingo Sanchez Sergio Chodos Waldo Jose Maria Farias Arnaldo Maximo Bocco Miguel Angel Pesce Dr. Marcos Eduardo Moiseeff
Fondo Fiduciario Anticiclico Fiscal	Fiscal Anti-Cyclical Fund	

II. Corporations in Which Argentina Has Ownership Interest

Company	Acronym (if any)
Empresa Argentina de Soluciones Satelitales	AR-SAT
Banco de Inversion y Comercio Exterior	BICE
Banco Ciudad de Buenos Aires	
Banco de Cordoba	
Banco de la Nación Argentina	BNA
Banco Provincia de Buenos Aires	
Correo Oficial de la Republica Argentina S.A.	
Energía Argentina S.A.	ENARSA
Lineas Aereas Federales S.A.	
Loteria Nacional	
Nacion AFJP	
Nucleoelectrica Argentina S.A.	NASA
Agencia Nacional de Noticias de la Republica Argentina	TELAM
Yacreta	
Tandanor S.A.C.I. y N.	
Agua y Saneamientos Argentinos S.A.	AYSA
Banco Hipotecario S.A.	
Central Dique S.A.	
Central Termica Guemes S, A.	

Papel Prensa	
Hidroelec. Piedra del Aguila S.A.	
Aerolineas Argentinas S.A.	
Fabrica Militar de Aviones	
Ferro Expreso Pampeano	
Ferrosur Roca S.A.	
Nuevo Central Argentino S.A.	
Central Termica Patagónia S.A.	
Transpa S.A.	
Planta Papelera Quilmes	
Casa de Moneda S.E.	
Construcción de Vivienda para la Armada	COVIARA
DIOXITEK, S.A.	
Educ.ar S.E.	
Terminal de Cargas Argentina S.A.	EDCADASSA
Administración General de Puertos	AGP
Polo Tecnológico Constituyentes S. A	
Sistema Nacional de Medios Publicos S.E.	SNMP
Yacimiento Carbonífero de Río Turbio	YCRT
Yacimientos Mineros de Agua de Dionisio	YMAD
América Latina Logística Central S.A.	

América Latina Logística Mesopotámica S.A.	
Interbaires S.A.	
Belgrano Cargas S.A.	

[United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG, [R.366], Declaration of Joshua I. Sherman in Support re: 365 Motion to Compel Banco de la Nacion Argentina to Produce Documents (November 1, 2010)]

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)
07 Civ. 2690 (TPG)
07 Civ. 6563 (TPG)
08 Civ. 2451 (TPG)
08 Civ. 3302 (TPG)
08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

[Dated June 14, 2010]

NML CAPITAL, LTD.,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

SUBPOENA IN CIVIL CASES

To: Banco de la Nación Argentina
225 Park Avenue
New York, NY 10003-1604

YOU ARE COMMANDED, pursuant to Rule 34(c) and Rule 45 of the Federal Rules of Civil Procedure (the "Rules"), to produce for inspection and copying to the offices of Dechert LLP, 1095 Avenue of the Americas, New York, New York 10036, attention: Joshua I. Sherman, within 30 days of service hereof, all documents specified in Attachment A to this subpoena, in accordance with the Definitions and Instructions set forth in Attachment A.

This subpoena has been issued by the United States District Court for the Southern District of New York. Your failure to produce documents as described in this subpoena may be punished as a contempt of that court.

Pursuant to the requirements of Rule 45(a)(1)(D) of the Rules, the text of Rule 45(c) and (d) is reproduced on the following page.

Dated: New York, New York
June 14, 2010

DECHERT LLP

By: /s/Robert A. Cohen
Robert A. Cohen
Joshua I. Sherman
(nml@dechert.com)
1095 Avenue of the Americas
New York, New York 10036

Telephone: (212) 698-3500
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Attorneys for Plaintiff NML Capital, Ltd.

Rule 45, Federal Rules of Civil Procedure, Parts C & D

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(I) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause,

considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

ATTACHMENT A

DEFINITIONS

1. "**Argentina**" means the Republic of Argentina, as well as its agencies, instrumentalities, ministries, political subdivisions, representatives, State Controlled Entities (as defined below), and all other Persons acting or purporting to act for or on behalf of Argentina, whether or not authorized to do so.

2. The term "**document**" or "**documents**" means all written, recorded or graphic material, however produced or reproduced, in Your actual or constructive possession, custody or control, including documents accessible at Your request, as defined in Federal Rule of Evidence 1001, Federal Rule of Civil Procedure 34(a), and Local Rule 26.3(c)(2), inclusively, and shall include, without limitation, the following: the original and all copies of all drafts or written or printed material, graphs, charts, photographs, records, audio or video tapes, and Electronically Stored Information, as defined below.

3. "**Electronically Stored Information**" ("ESI") includes, without limitation, the following:

a) information that is generated, received, processed, and recorded by computers and other electronic devices including, without limitation, voicemail;

b) internal or external websites;

c) output resulting from the use of any software program, including, without limitation, word processing documents, spreadsheets,

database files, charts, graphs and outlines, electronic mail, AOL Instant Messenger (or similar programs) or bulletin board programs, operating systems, source code, PRF files, PRC files, batch files, ASCII files, and all miscellaneous media on which they reside and regardless of whether said electronic data exists in an active file, a deleted file, or file fragment; and

d) activity listings of electronic mail receipts and/or transmittals; and any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, or on any other media for digital data storage or transmittal, such as, but not limited to, a personal digital assistant, *e.g.*, BlackBerry, iPhone, Palm Pilot, or similar devices, and file folder tabs, or containers and labels appended to, or relating to, any physical storage device associated with each original or copy of all documents requested herein.

4. "**Person**" means any natural person or any business, legal or governmental entity or association. Local Civil Rule 26.3(c)(6).

5. "**Relevant Time Period**" means between May 31, 2009 and the date on which on which you produce documents in response to this subpoena.

6. "**State Controlled Entity**" means any agency, corporation, department, ministry, subdivision or other entity controlled directly or indirectly by Argentina, or of which more than 25% of the equity or

other ownership interest is directly or indirectly owned or held by Argentina.

7. **"You," "Your,"** or **"BNA"** means Banco de la Nación Argentina, its agents, representatives, employees, directors, affiliates, parents, subsidiaries, attorneys, accountants and all other Persons acting or purporting to act on its behalf, whether or not authorized to do so.

8. **"Sufficient To Identify"** means that the documents produced reveal, contain or disclose information with respect to the matter inquired that is sufficiently detailed to provide all of the information sought in the inquiry. To the extent any Persons are to be identified, the documents produced shall identify them in accordance with Local Civil Rule 26.3(c)(3).

9. Documents referred to herein shall include all portions, or pages of each document referred to and all attachments, exhibits, enclosures, appendices and supporting documentation, and including, without limitation, originals, copies, drafts, working papers, routing slips, handwritten notes and similar materials (with or without notes or changes therein).

10. A document is deemed in Your actual or constructive possession, custody or control if it is in Your physical custody or if it is in the physical custody of any other Person, and You (i) own such document in whole or in part; (ii) have a right, by control, contract, statute, order or otherwise, to use, inspect, examine or copy such document on any terms; (iii) have an understanding, express or implied, that You may use, inspect, examine or copy such document on any terms; or (iv) have, as a practical matter, been able to use,

inspect, examine or copy such document when You sought to do so. For the avoidance of doubt, a document is deemed in Your actual or constructive possession, custody or control if it is accessible on a hard-drive (whether or not it is currently active), network or server maintained by You or can be accessed by, or at the direction of, any of Your employees.

11. The words "all" and "each" shall be construed as "all and each." Local Civil Rule 26.3(d)(1). "Any" includes the word "all," and "all" includes the word "any." "And" or "or" shall be construed disjunctively or conjunctively as necessary to make the request inclusive rather than exclusive. Local Civil Rule 26.3(d)(2).

12. The plural of any word used herein includes the singular and the singular includes the plural. Local Civil Rule 26.3(d)(3). The masculine gender of any word used herein includes the feminine and vice versa. The past tense of a verb used herein includes the present tense and the present tense includes the past tense.

INSTRUCTIONS

1. In producing responsive documents, You should furnish all documents or things in your possession, custody or control, regardless of whether such documents or materials are possessed directly by You or your directors, officers, partners, members, agents, employees, representatives, subsidiaries, managing agents, affiliates, investigators, or by Your attorneys or their agents, employees, representatives or investigators.

2. If any responsive document is not or cannot be produced in full, produce it to the extent possible,

indicating which document, or portion of that document is being withheld, and the reason that document is being withheld.

3. You should produce each responsive document together with all non-identical copies and drafts of that document. If the original of any document cannot be located, a copy shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

4. All documents are to be produced as they are kept in the usual course of business, with any identifying labels, file markings or similar identifying features, and shall be organized and labeled to correspond to the appropriate category herein.

5. Documents attached to each other should not be separated.

6. Documents not otherwise responsive to this subpoena are to be produced if such documents mention, discuss, refer to, or explain the documents which are responsive to this subpoena, or if such documents are attached to documents responsive to this subpoena and constitute routing slips, transmittal memoranda, or letters, comments, evaluations or similar materials.

7. In responding to this subpoena, if You encounter any ambiguity in construing an individual request or any definitions and instructions relevant thereto, set forth the matter or term deemed "ambiguous" and the construction used in responding to such request.

8. With respect to ESI:

1) All electronic mail and spreadsheets responsive to this subpoena that are maintained in the usual course of business in electronic format shall be produced in their native format along with the software necessary to interpret such files if such software is not readily available.

2) All other documents responsive to this subpoena that are maintained in the usual course of business in electronic format shall be produced in properly utilized, multi-page TIFF Group IV format complete with full text extracts and all associated metadata.

3) All documents responsive to this subpoena shall be produced with the metadata normally contained within such documents, and the necessary Concordance or Introspect load files, or similar load files. If such metadata is not available, each document shall be accompanied by a listing of all file properties relating to such document, including, but not limited to, all information relating to the date(s) the document was last accessed, created, modified or distributed, and the author(s) and recipient(s) of the document.

4) Under no circumstances should ESI be converted from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome to use. ESI should not be produced in a form

that removes or significantly degrades the ability to search the ESI by electronic means where the ESI is ordinarily maintained in a way that makes it searchable by electronic means. Databases or underlying data should not be produced without first discussing production format issues with Plaintiff's counsel. If you decline to search or produce ESI on the ground that such ESI is not reasonably accessible because of undue burden or cost, identify such information by category or source and provide detailed information regarding the burden of cost you claim is associated with the search or production of such ESI.

9. If any documents or parts of documents requested are not produced due to a claim of privilege, You shall furnish a list identifying, for each document or portion thereof that is withheld: (i) its author; (ii) all recipients including, but not limited to, those carbon copied; (iii) its subject matter; (iv) the privilege claimed; and (v) the grounds underlying the assertion of privilege. You shall further produce all non-privileged portions of any documents affected by a claim of privilege.

10. In the event that any responsive documents have been lost or destroyed, You are to furnish a list setting forth, for each such document: (i) the date of the document; (ii) the Person(s) who prepared the document; (iii) each Person to whom a copy of the document was furnished, or to whom its contents were communicated; (iv) a summary of the substance of the document; (iv) the date upon which the document was

destroyed; and (v) the reason the document was destroyed.

DOCUMENTS TO BE PRODUCED

1. Documents originating within the Relevant Time Period Sufficient To Identify any property, assets or accounts maintained at BNA anywhere in the name of Argentina or for Argentina's benefit.

2. Documents originating within the Relevant Time Period Sufficient To Identify any debt owed by BNA to Argentina.

3. Documents Sufficient To Identify any transfers of property in to or out of accounts at BNA anywhere in the name of Argentina or for Argentina's benefit during the Relevant Time Period, including but not limited to:

   a. Documents Sufficient To Identify any counterparties or intermediaries involved in such transfers;

   b. Documents Sufficient To Identify any accounts, including intermediary accounts not maintained by BNA, involved in such transfers;

   c. Documents Sufficient To Identify the nature and value of the property involved; and

   d. Documents Sufficient To Identify the purpose of such transfers.

[United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:03-cv-08845-TPG, [R.393], Declaration of Mark S. Sullivan in Opposition re: 365 Motion to Compel Banco de la Nacion Argentina to Produce Documents (February 10, 2011)]

Exhibit 1: Persons or Entities Falling Under the Definition of "Argentina"

I. Ministries, Secretariats, Ministers and Secretaries

Office
Presidencia de la Nacion
Vicepresidente
Secretarías de Estado
Secretaría General
Subsecretaría General
Subsecretaría de Coordinación
Secretaría de Inteligencia
Secretaría Legal y Tecníca
Secretaría de Programación para la Prevención de la Drogadicción y la Lucha contra el Narcotráfico
Secretaría de Cultura
Unidad de Planificación y Evaluación de la Educación
Casa Militar
Consejo Nacional de Coordinación de Políticas Sociales

Jefatura de Gabinete de Ministros
Jefe de Gabinete
Subsecretaría de Coordinación y Evaluación Presupuestaria
Secretaría de Gestión Pública
Secretaría de Gabinete y Relaciones Parlamentarias
Subsecretaría de Relaciones Institucionales
Subsecretaría de Reforma Institucional y Fortalecimiento de la Democracia
Secretaría de Medios de Comunicación
Subsecretaría de Gestión de Medios
Subsecretaría de Comunicación
Subsecretaría de Comunicación Estratégica
Secretaría de Ambiente y Desarrollo Sustentable
Subsecretaría de Coordinación de Políticas Ambientales
Delegación Técnico Administrativa
Subsecretaría de Planificación de Políticas Ambientales
Subsecretaría de Promoción del Desarrollo Sustentable

Subsecretaría de Control y Fiscalización Ambiental y Prevención de la Contaminación
Ministerio del Interior
Ministro
Secretaría de Provincias
Secretaría de Asuntos Políticos y Electorales
Secretaría de Asuntos Municipales
Secretaría de Interior
Subsecretaría de Interior
Subsecretaría de Coordinación
Subsecretaría de Gestión Municipal
Dirección Nacional de Migraciones
Dirección Nacional del Registro Nacional de las Personas
Registro Nacional de Armas
Ministerio de Relaciones Exteriores, Comercio Internacional y Culto
Ministro
Secretaría de Relaciones Exteriores
Subsecretaría de Relaciones Institucionales
Subsecretaría de Política Latinoamericana

Subsecretaría de Política Exterior
Secretaría de Comercio y Relaciones Económicas Internacionales
Subsecretaría de Comercio Internacional
Subsecretaría de Integracíon Económica Americana y Mercosur
Subsecretaría de Coordinación y Cooperación Internacional
Subsecretaría Legal, Tecníca y Administrativa
Secretaría de Culto
Subsecretaría de Culto
Comision Nacional de Actividades Espaciales
Instituto del Servicio Exterior de la Nación
Ministerio de Defensa
Ministro
Jefe de Gabinete
Subsecretaría de Coordinación
Secretaría de Asuntos Internacionales de la Defensa
Jefe de Gabinete
Subsecretario de Coordinación
Secretaría de Planeamiento
Subsecretario de Planificación Logística y Operativa de la Defensa

Subsecretario de Investigación
Secretaría de Estrategía y Asuntos Militares
Subsecretaria de Planeamiento Estratégico y Política Militar
Subsecretaría de Formación
Directora Nacional de Derechos Humanos y el Derecho Internacional Humanitario
Unidad Auditoria Interna
Dirección de Comunicación Social
Dirección Nacional de Inteligencia Estratégica Militar
Director de Comunicación Social
Auditor Interno
Ministerio de Economía y Finanzas Públicas
Ministro
Secretaría de Política Económica
Subsecretaría de Programación Económica
Subsecretaría de Coordinación Economica
Secretaría de Comercio Interior
Subsecretaría de Defensa del Consumidor
Secretaría de Finanzas
Subsecretaría de Financiamiento

Subsecretaría de Servicios Financieros
Secretaría de Hacienda
Subsecretaría de Presupuesto
Subsecretaría de Relaciones con Provincias
Subsecretaría de Ingresos Publicos
Secretaría Legal y Administrativa
Subsecretaría de Administración y Normalización Patrimonial
Subsecretaría Legal
Coordinadora de Ceremonial
Ministerio de Planificacíon Federal Inversión Pública y Servicios
Ministro
Subsecretaría de Planificación Territorial de la Inversión Pública
Secretaría de Obras Públicas
Subsecretaría de Coordinación de Obra Pública Federal
Subsecretaría de Desarrollo Urbano y Vivienda
Director Nacional de Coordinación de Política y Programa Habitacionales
Director Nacional de Infrastructura Social

Director Nacional de Políticas Habitacionales
Director Nacional de Desarrollo Urbano
Subsecretario de Tierras para el Hábitat Social
Subsecretaría de Obras Públicas
Subsecretaría de Recursos Hídricos
Director Nacional de Proyectos y Obras Hídricas
Director Nacional de Planificación Hídrica y Coordinación Federal
Director Nacional de Conservación y Protección de los Recursos Hídricos
Secretaría de Minería
Director Nacional de Minería
Director Nacional de Planificación Estrategica Regional
Secretaría de Energía
Director Nacional de Prospectiva
Director Nacional de Promoción
Subsecretaría de Energía Eléctrica
Subsecretaría de Combustibles
Director Nacional de Economía de los Hidrocarburos
Director Nacional de Refinación y Comercialización
Director de Exploracion, Producción y Transporte de Hidrocarburos
Secretaría de Comunicacíones

Secretaría de Transporte
Subsecretaría de Puertos y Vias Navegables
Director Nacional de Transporte Fluvial y Maritimo
Director Nacional de Puertos
Director Nacional de Vias Navigables
Subsecretaría de Transporte Aerocomercial
Director Nacional de Transporte Aerocomercial
Director de Legislación y Acuerdos
Subsecretaría de Transporte Automotor
Director de Saneamiento Hídrico
Subsecretaría de Transporte Ferroviario
Director Nacional de Transporte Ferroviario
Subsecretaría de Coordination y Control de Gestión
Director General de Recursos Humanos y Organización
Director General de Coordinación Institucional
Director General de Administración
Subsecretaría Legal

Ministerio de Justicia, Seguridad y Derechos Humanos
Ministro
Procuración del Tesoro de la Nación
Escribanía General del Gobierno de la Nación
Unidad de Auditora Interna
Programa Verdad y Justicia
Departamento de Ceremonial
Consejo de Seguridad Interior
Departamento Comunicaciones y Prensa
Subsecretaría de Coordinacíon e Innovacíon
Secretaría de Asuntos Registrales
Secretaría de Seguridad Interior
Secretaría de Derechos Humanos
Secretaría de Justicia
Secretaría Seguridad Interior
Subsecretaría de Coordinación
Oficina Anticorrupción
Subsecretaría de Planificación Estratégica
Subsecretaría de Politica Criminal y Asuntos Penitenciarios
Caja de Retiro Jubilaciones y Pensiones de la Policia Federal

Ministerio de Educacíon
Ministro de Educacíon
Subsecretaría de Planeamiento Educativo
Subsecretaría de Equidad y Calidad
Subsecretaría de Coordinación Administrativa
Secretaría de Educacíon
Secretaría de Políticas Universitarias
Secretaría del Consejo Federal de Educación
Ministerio de Ciencia, Tecnología e Innovación Productiva
Ministro
Subsecretaría de Coordinacíon Administrativa
Directora Nacional de Relaciones Internacionales
Secretaría de Planeamiento y Políticas de Ciencia, Tecnología e Innovación Productiva
Subsecretaría de Políticas de Ciencia, Tecnología e Innovación Productiva
Subsecretaría de Estudios y Prospectivas
Secretaría de Articulación Cientifico Tecnológica
Subsecretaría de Coordinacíon Institucional

Subsecretaría de Evaluación Institucional
Coordinador Ejecutivo del Gabinete Cientifico Tecnológico (GACTEC)
Secretario General del Consejo Federal de Ciencia y Technología - COFECYT
Ministerio de Labor, Empleo y Seguridad Social
Ministro
Subsecretaría de Coordinacíon
Subsecretaría de Programación Técnica e Estudios Laborales
Secretaría de Trabajo
Subsecretaria de Coordinación
Secretaría de Seguridad Social
Secretaría de Empleo
Superintendencia de Administradores de Fondos de Jubilaciones y Pensiones
Superintendencia de Riesgos del Trabajo
Superintendencia Nacional de la Seguridad Social
Ministerio de Salud
Ministro

Secretaría de Politica, Regulación y Relaciones e Institutos
Secretaría de Promoción y Programas Sanitarios
Ministerio de Desarrollo Social
Ministro
Secretaría de Gestión y Articulación Institucional
Secretaría de Políticas Sociales y Desarrollo Humano
Secretaría de Deportes
Ministerio de Industría y Turismo
Ministro
Secretaría de Turismo
Secretaría de la Industría y Comercio
Subsecretaría de Industría
Subsecretaría de Politíca y Gestión Comercial
Secretaría de la Pequeña y Mediana Empresa y Desarrollo Regional
Subsecretaría de Política y Gestión de la PyME y Desarrollo Regional
Subsecretaría de Promoción al Financiamiento de la PyME
Subsecretaría de Coordinación

Agencia Nacional de Desarrollo de Inversiones
Ministerio de Agricultura, Ganadería y Pesca
Ministro
Secretaría Relaciones Institucionales
Subsecretaría de Coordinación Institucional
Subsecretaría de Comunicación Institucional
Secretaría Desarrollo Rural y Agricultura Familiar
Subsecretaría de Desarrollo de Economías Regionales
Subsecretaría de Agricultura Familiar
Secretaría Agricultura, Ganadería, and Fisheries
Subsecretara de Agricultura
Subsecretaría de Lecheria
Subsecretaría de Pesca y Agricultura
Subsecretaría de Coordinacíon Técnica y Administrativa
Subsecretaría de Ganadería
Banco Central de la República Argentina (BCRA)

Fondo Fiduciario Anticiclico Fiscal

[United States District Court, Southern District New York (Foley Square), *NML Capital, Ltd. v. Republic of Argentina*, Case No. 1:08-cv-06978-TPG, [R.284], Declaration of Eric C. Kirsch, (January 20, 2011)]

EXHIBIT B [excerpt]

Fiscal Agency Agreement

* * *

To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any Specified Court is located, in which any Related Proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any Specified Court or Other Court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, form attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment), provided that such waiver shall not be effective (i) with respect to the assets which constitute freely available reserves pursuant to Article

6 of the Convertibility Law (the "Convertibility Law"), the amount, composition and investment of which will be reflected on the balance sheet and accounting statement of Banco Central consistently prepared pursuant to Article 5 of the Convertibility Law and (ii) with respect to property of the public domain located in the territory of The Republic of Argentina or property owned by the Republic and located in its territory which is dedicated to the purpose of an essential public service, and provided further that such agreement and waiver, insofar as it relates to any jurisdiction other than a jurisdiction in which a Specified Court is located, is given solely for the purpose of enabling the Fiscal Agent or a holder of Securities of this Series to enforce or execute a Related Judgment. The waiver of immunities referred to herein constitutes only a limited and specific waiver for the purpose of the Securities of this Series and the Fiscal Agency Agreement and under no circumstances shall it be interpreted as a general waiver of the Republic or a waiver with respect to proceedings unrelated to the Securities of this Series or the Fiscal Agency Agreement.

* * *

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 24 2014
OFFICE OF THE CLERK

No. 12-842

In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

JONATHAN I. BLACKMAN
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February 24, 2014

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

QUESTION PRESENTED

Sections 1609 and 1610(a) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, limit execution on property of a foreign state to "property . . . in the United States . . . used for a commercial activity in the United States."

Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits.

LIST OF PARTIES

The petitioner in this case is the Republic of Argentina, defendant-appellant below. The respondent, and plaintiff-appellee below, is NML Capital, Ltd.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 695 F.3d 201. Pet. App. A.[1] The relevant order of the district court is not published. Pet. App. B.

JURISDICTION

The court of appeals entered its opinion on August 20, 2012, and denied a timely petition for rehearing *en banc* on October 10, 2012. The petition for a writ of certiorari was filed on January 7, 2013, and granted on January 10, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1602, 1603, 1604, 1605(a), 1606, 1609, 1610(a), and 1611, are set forth in the Statutory Appendix at 1a–20a.

STATEMENT

The FSIA provides the sole basis for enforcing a judgment against a foreign state. The statute provides that all property of a foreign state is presumptively immune from the authority of U.S. courts, unless it is both located in and used for a commercial activity in

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[1] The appendix that the Republic of Argentina (the "Republic" or "Argentina") filed with its petition for writ of certiorari is referred to as "Pet. App." Accompanying this brief is a joint appendix, referred to as "JA," and a statutory appendix, referred to as "Stat. App."

the United States. *See* 28 U.S.C. §§ 1609–1611 (Stat. App. 13a–20a). Nevertheless, the court of appeals held below that a district court may order, in supplementary judgment enforcement proceedings under the FSIA, discovery of foreign-state assets that are not located in the United States or used for a commercial activity, because once a court has personal and subject matter jurisdiction over a foreign state, "it [can] exercise its judicial power over [the sovereign] as over any other party." Pet. App. 18. According to the court of appeals, NML is entitled to discovery concerning all of Argentina's property located around the world and regardless of its use, including military and diplomatic property, because that information might lead to successful enforcement proceedings in foreign jurisdictions under a foreign country's immunity laws.

But as a foreign state, Argentina is not just "any other party." The court of appeals' unprecedented ruling, which permits U.S. courts to conduct a "forensic examination" of foreign-state assets and serve as a "clearinghouse for information . . . that might lead to attachments or executions anywhere in the world," Pet. App. 31, 41, defies the language, structure, and history of the FSIA, as well as the principles of comity and reciprocity that underlie it. The Court should reject the Second Circuit's boundless and extraterritorial conception of asset discovery against foreign states and adopt the standard applied by every other court of appeals that has addressed the issue, which have all held that such discovery must be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.

A. The Foreign Sovereign Immunities Act

1. Although today the FSIA governs the immunities afforded to foreign states and their property, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). The "source of [this Court's] foreign sovereign immunity jurisprudence," *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004), is Chief Justice Marshall's opinion for the Court in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which concluded that federal courts lacked jurisdiction over an armed ship of the emperor of France because "the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). That decision and its progeny broadly extended virtually absolute immunity to foreign sovereigns as "a matter of grace and comity," *id.*, founded on the United States' understanding that both international practice, and its own self-interest, necessitate such comity.

Following *Schooner Exchange*, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels." *Samantar*, 560 U.S. at 311 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945)); *Ex parte Republic of Peru*, 318 U.S. 578, 587–89 (1943). First, the State Department could file a formal suggestion of immunity with the court on behalf of the foreign state, which, if granted, as it invariably was, resulted in the dismissal of the case for lack of jurisdiction. *See Samantar*, 560 U.S. at 311. Second, if the State Department said nothing, a district

court "had authority to decide for itself whether all the requisites for such immunity existed." *Id.* (internal quotation marks omitted). As a practical matter, absolute immunity from jurisdiction and judgment execution remained the rule, because "[p]rior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns." *Id.* at 312.

To better align the law of the United States with the immunity regimes of other sovereigns, the State Department in 1952 adopted the "restrictive" theory of foreign sovereign immunity, according to which immunity "is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487; *see also* Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–85 (1952). Importantly, however, this change did not alter the practice of affording sovereign property absolute immunity from attachment and execution. *See, e.g.*, *Weilamann v. Chase Bank*, 21 Misc.2d 1086, 1087–89 (N.Y. Sup. Ct. Westchester Cnty. 1959); *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685–87 (S.D.N.Y. 1955). Thus, for the first time, jurisdiction to adjudicate liability diverged from the power to execute and enforce a judgment, a distinction that Congress would eventually carry over into the FSIA.

2. The State Department's recommendations of immunity from suit were frequently influenced by political considerations, which in turn resulted in the

inconsistent application of jurisdictional sovereign immunity in U.S. Courts. Congress responded in 1976 by enacting the FSIA "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 487–88 (quoting H.R. Rep. 94-1487 at 7 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6606 ("House Report")); *see also Altmann*, 541 U.S. at 716. Section 1602 of the FSIA describes the Act's two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. Stat. App. 1a. Section 1602 further provides that all "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.*

To accomplish these goals, "the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) ("FSIA provides the sole basis for obtaining jurisdiction over a foreign state"). The scheme is two-fold. First, foreign states are immune from jurisdiction unless an express exception applies, such as when a sovereign has consented to jurisdiction. *See* 28 U.S.C. §§ 1604–1605 (Stat. App. 2a–8a).

Second, even when a foreign sovereign is subject to jurisdiction, courts' post-judgment remedial powers are

strictly constrained. A foreign state's property is "immune from attachment arrest and execution except as provided in sections 1610 and 1611." *See* 28 U.S.C. § 1609 (Stat. App. 13a). Section 1610 provides that a foreign state's property "shall not be immune from attachment in aid of execution, or from execution, upon a judgment" *if* it is "used for a commercial activity in the United States" *and* the sovereign has waived its immunity or another express exception applies. 28 U.S.C. § 1610(a) (Stat. App. 13a–14a). As the House Judiciary Committee Report states, "[t]he term 'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. *See* Fed. R. Civ. P. 69." House Report at 28. Foreign-state property in the United States that is not used for commercial activity here is therefore immune from post-judgment proceedings in aid of execution, as is foreign-state property outside the United States. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008). Section 1611 provides additional protections for uniquely sovereign assets, including military property. 28 U.S.C. § 1611(b) (Stat. App. 19a–20a).

The FSIA's broad enforcement immunity reflects a deliberate policy choice on the part of Congress. *See* Brief for the United States as *Amicus Curiae* at *8–9, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (Dec. 4, 2013) ("U.S. *Amicus* Br."). While Congress codified the "restrictive theory" of immunity from suit, *see Altmann*, 541 U.S. at 689–91 (2004), the "enforcement [of] judgments against foreign state

property remain[ed] a somewhat controversial subject in international law," House Report at 27; *accord* Restatement (Third) of Foreign Relations Law of the United States § 460 n. 1 (1987). "Enforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes" than entry of a judgment. Hazel Fox & Philippa Webb, *The Law of State Immunity* 481 (3d ed. 2013). Judicial seizure of a foreign state's property thus may "be regarded as 'an affront to [the sovereign's] dignity and may . . . affect our relations with it.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Hoffman*, 324 U.S. at 35–36). The political branches therefore struck a delicate balance between the rights of creditors and the foreign relations imperative of respecting foreign sovereigns. Congress proceeded cautiously, "remedy[ing], *in part*, the predicament of a plaintiff who has obtained a judgment against a foreign state." House Report at 8 (emphasis added); *see also id.* at 27 ("*partially* lowering" the preexisting rule of absolute immunity (emphasis added)). Congress thereby left intact foreign states' absolute enforcement immunity for military property, 28 U.S.C. § 1611(b) (Stat. App. 19a–20a), and deliberately restricted execution and execution-related remedies on other foreign-state property to property located in the United States and used for a commercial activity in the United States, 28 U.S.C. § 1610(a) (Stat. App. 13a–14a).[2]

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[2] This limitation also necessarily excludes enforcement and enforcement remedies against property used for a diplomatic activity, which of course is not "commercial" activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 369 (1993) (White, J., concurring) (citing House Report for proposition that "employment of diplomatic .

B. The Argentine Crisis and NML's Execution Efforts

1. After a prolonged economic recession that reached its nadir in 2002, the Republic experienced the worst economic, social, and political crisis of its modern history, marked by an enduring recession, widespread poverty and unemployment, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca ¶¶ 4–13, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. June 11, 2003); Decl. of Federico Carlos Molina ¶ 3, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Mar. 24, 2005). With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period.[3] Larry Rohter, *Bank Holiday and Creditors Add to Crisis in Argentina*, N.Y. Times, April 22, 2002.

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personnel" is a "distinctly sovereign activit[y]" and is therefore "public or governmental and not commercial in nature").

[3] The Argentine crisis has been described as the "worst-case scenario" in eight centuries of modern financial crises. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises*, at 51 (2008), *available at* http://www.nber.org/papers/w13882.pdf; *see also* Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food.").

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine population. "[U]nable to service its debts," the Republic had no choice but to defer interest and principal payments to its bondholders. *See* Panel of Independent Advisers, *Economic and Financial Issues Facing Argentina*, Report to the Government of Argentina and the International Monetary Fund, ¶ 1 (July 29, 2002), *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm. Like many nations that have faced economic crisis and unsustainable indebtedness, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, *Alexander Hamilton: A Biography* 163–88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt.[4]

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[4] The United States, the international financial community, and the federal courts have all recognized the importance of voluntary sovereign debt restructuring. *See, e.g.*, Brief for the United States as *Amicus Curiae* in Support of Reversal at *6–10, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L), 2012 WL 1150791 (2d Cir. Apr. 4, 2012); Statement of Interest of the United States at *2–6, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), 2004 WL 5475206 (S.D.N.Y. Jan. 12, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("[T]he United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures . . .").

Because there is no bankruptcy regime for insolvent states, the Republic followed international practice favoring the orderly and consensual restructuring of sovereign debt and successfully restructured its unsustainable external debt through two voluntary global exchange offers in 2005 and 2010. Participating holders exchanged old, nonperforming bond interests for new, performing bond interests with lower interest rates, reduced principal, and/or longer maturities. The Republic has consistently made timely payments on its restructured debt.

The exchange offers were extended on the same terms to all beneficial owners of eligible bonds—including respondent NML Capital, Ltd. ("NML")—and reflected the Republic's commitment to treat its private creditors equitably. The Republic did not repudiate that debt. Owners tendered approximately 92% of the aggregate eligible debt in the exchange offers, making the Republic's sovereign debt restructuring the largest in history at that time. *See* Republic of Argentina, Annual Report (Form 18-K), at 17 (Sept. 30, 2011), *available at* http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm. NML declined to participate in the restructuring.

2. NML, a Cayman Islands hedge fund established exclusively to buy distressed Republic debt, acquired beneficial interests in Republic bonds at a deep discount both immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. NML and similar "vulture" hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign

context by bringing lawsuits for the face value of defaulted sovereign debt, obtaining judgments on which interest continues to run indefinitely, and then using aggressive means to try to collect on them, notwithstanding the broad immunity afforded foreign-state property under the FSIA.[5]

NML has sought to enforce its judgments against the Republic through a series of execution attempts against immune property of the Republic and other entities[6] that the federal courts have in most cases

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[5] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Feb. 24, 2014) ("[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts . . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure." (internal quotation marks omitted)); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

[6] These entities are presumptively separate from the Republic and therefore also presumptively immune from execution on Republic debt. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government

rejected as violating the FSIA.[7] NML has also sought, unsuccessfully, to execute against property abroad, including by trying to attach taxes owed to the Republic in France,[8] to attach diplomatic bank accounts in France[9] and Belgium,[10] and to seize an Argentine

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instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." (citation omitted)).

[7] *See, e.g.*, *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196–97 (2d Cir. 2011) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied*, 133 S. Ct. 23 (2012); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130–31 (2d Cir. 2009) (rejecting attempt by NML and others to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States"), *cert. denied*, 130 S. Ct. 1691 (2010); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465–66 (2d Cir. 2007) (rejecting NML's other attempt to attach property of the central bank of Argentina), *cert. denied*, 522 U.S. 818 (2007); *NML Capital, Ltd. v. Spaceport Sys. Int'l., L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011) (rejecting NML's attempt to execute on satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-00197 (CKK), 2005 U.S. Dist. LEXIS 47027, at *56-57 (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C.).

[8] *See NML Capital, Ltd. v. Republic of Argentina*, Cour d'appel [CA] [regional court of appeal] Paris, 4e pôle 8e ch., Dec. 9, 2010, No. 10/00390 (Fr.) (appeal pending to the Cour de Cassation [French Supreme Court]).

[9] *See NML Capital, Ltd. v Republic of Argentina*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.), *available at* http://www.courdecassation.

naval vessel in Ghana,[11] in each case without any claim by NML that it needed discovery from a United States court to pursue these legally improper execution efforts.

Most recently, NML has obtained injunctions prohibiting the Republic from making periodic payments on its restructured debt unless it also pays 100% of NML's defaulted debt. *See NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 240–41 (2d Cir. 2013); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012). The court of appeals' decisions affirming those orders are currently the subject of petitions for certiorari filed with this Court. *See* Petition for Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.*, No. 13-990 (Feb. 18, 2014); *see also* Petition for Writ of Certiorari, *Exchange Bondholder Group v. NML Capital, Ltd.*, No. 13-991 (Feb. 18, 2014).

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fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html.

[10] *See Republic of Argentina v. NML Capital, Ltd.*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 22, 2012, No. C.11.0688.F/1 (Belg.).

[11] Order, *The "ARA Libertad Case" (Argentina v. Ghana)*, International Tribunal for the Law of the Seas (ITLOS) (Dec. 15, 2012), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf; *Republic of Argentina v. High Court (Comm. Div.) Accra Ex Parte, Attorney General*, No.J5/10/2013 (Ghana S.C., June 20, 2013).

C. The Decisions Below

1. Having failed to satisfy its judgments with property subject to execution under the FSIA—*i.e.*, property of the Republic used for a commercial activity *in* the United States—NML in 2010 expanded its enforcement efforts beyond the scope contemplated by the FSIA by demanding from Bank of America and Banco de la Nación Argentina ("BNA")[12] discovery of information concerning all purported property—regardless of its use or location—of the Republic and a multitude of other individuals and entities. In NML's words, it sought to conduct a "forensic examination" of the Republic's worldwide "financial circulatory system." *See* Pet. App. 5, 41, 60–61; *see also id.* at 65 (NML's counsel: "[W]e should have this information, Judge, so that we can find out what [the Republic] is doing around the world.").

The subpoena served on Bank of America defined the Republic as including 136 public officials, 43 independent entities,[13] and 148 purported "Ministries" and "Secretariats" of the Republic, as well as countless unspecified alleged "agencies, ministries, instrumentalities, political subdivisions, employees, attorneys, representatives, affiliates, subsidiaries,

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[12] BNA, Argentina's largest commercial bank, is wholly-owned by the Republic and thus is a "foreign state" under the FSIA that is entitled to its own sovereign immunity. 28 U.S.C. § 1603.

[13] Pet. App. 69 (NML's counsel: "We are not required to establish at this time that any particular agency is or is not an alter ego. What we have shown, which is sufficient, is that these agencies and these individuals might have information subject to discovery.").

predecessors, successors, alter-egos, and assigns." JA 49, JA 57–76. For each of these entities and individuals, the subpoena demands information concerning, *inter alia*, "[e]ach asset or property of any kind whatsoever which [they] owned directly or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially." JA 56. The subpoena served on BNA was equally expansive, defining the Republic to include 225 entities, including all "agencies, instrumentalities, ministries, political subdivisions, representatives, [and] State Controlled Entities," and demanding documents concerning "any property, assets or accounts maintained at BNA *anywhere* in the name of Argentina or for Argentina's benefit." JA 91–105.

Each subpoena contains unprecedented demands for information concerning *military* and *diplomatic* property, as well as property held by the Secretariat of Intelligence (Argentina's intelligence agency) wherever located around the world. *E.g.*, JA 57, JA 58, JA 61, JA 63 (defining "Argentina" to include the "Ministry of Foreign Affairs," which oversees Argentina's diplomatic activities, and the Republic's "Military Headquarters" and "Ministry of Defense"). The subpoenas do not provide any basis—let alone a plausible basis—to support the claim that any of the purported property at which they are directed is subject to attachment and execution under the FSIA (or for that matter the laws of any nation). Rather, as NML later explained, it sought to obtain information concerning *all* such property, regardless of whether it was immune under the FSIA or the laws of another jurisdiction, so that it could "determine [for itself] whether or not it is suggestive of a commercial transaction to buy goods,

[or] to invest money someplace," Pet. App. 33, and then decide whether to pursue enforcement proceedings abroad, *see also* Pet. App. 74 (NML's counsel stating that the information may allow NML to attach, for example, "food for hospitals").

The Republic moved to quash the Bank of America subpoena and Bank of America joined. Among other things, the Republic argued that because execution on property of a foreign state under the FSIA is limited to "property in the United States of a foreign state . . . used for a commercial activity in the United States," 28 U.S.C. § 1610(a) (Stat. App. 13a–14a), discovery of property *outside* the United States, and therefore by definition not subject to execution under the statute, is neither permissible under the FSIA, which shields sovereigns from the burdens of litigation in both the pre- and post-judgment context, nor relevant as a matter of law to execution under the FSIA. NML then moved to compel BNA and Bank of America to comply with the subpoenas, arguing that the FSIA's enforcement immunity was irrelevant to discovery in aid of execution because the statute does not expressly state that the property immunities apply to discovery. *See* Pet. App. 35 (NML's counsel: "There is nothing in the Foreign Sovereignty [sic] Immunities Act that even talks about discovery.").

Recognizing the unprecedented nature of NML's demands for worldwide discovery of sovereign assets wholly divorced from any immunity determination, the district court at a hearing in December 2010 initially expressed concern about ordering compliance with them. *See* Pet. App. 66 ("[D]iscovery is taking a shape that it has not taken before . . . . you are seeking

information about assets located in foreign countries so that you might take advantage of the law of foreign countries which might be different from United States law, the Foreign Sovereign Immunities Act."); *id.* at 70–71 ("I have no picture at all of what a country such as the Republic of Argentina might be sending or receiving messages about of a financial nature. . . . [I]t is a functioning government of a sizeable and important country. . . . I really don't know what they would be communicating about in the way of finance. . . . It is not the Argentine Steel Corporation. This is the Republic of Argentina."); *id.* at 74 ("I would be surprised if France or Germany or England or anybody else over there would allow the attachment of strictly government property. . . . I wouldn't want to just start and say, well, maybe it could be done and, therefore, there should be all of this discovery."). The court reserved decision and instructed the parties to "narrow the subject matter," stating: "[I]f I enforced the subpoena against Bank of America as to what it demands on its face, I believe that enforcement would dredge up a great deal of material of no use to the plaintiffs." *Id.* at 84; *see also id.* ("The Republic of Argentina is a government, and I have to assume that most of its activities, including communications about finances, relate to governmental matters.").

Notwithstanding its initial well-founded hesitation, the district court later reversed course at a second hearing and, citing no authority, ordered Bank of America and BNA to comply nearly in full with the subpoenas.[14] The court rejected the Republic's FSIA

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[14] NML's only narrowing of its original demands was to "limit" the individuals listed in the subpoenas to the current and most recent

arguments and concluded that it would serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Pet. App. 31 (emphasis added). Although it had previously found insufficient NML's bare assertions that such discovery might somehow lead to attachable property abroad, the district court held that, notwithstanding the FSIA's strict limitation on the enforcement of judgments to commercial property in the United States, plaintiffs could seek discovery of *all* sovereign property *worldwide* because under some "theory" it "might" lead to attachable assets "in a foreign country." Pet. App. 44.

The district court orally granted NML's motions to compel and denied the Republic's, BNA's, and Bank of America's objections to the subpoenas as well as the Republic's motion to quash, which it confirmed by a brief written Order on September 2, 2011 (the "Discovery Order"). Pet. App. 21–22.

2. The Second Circuit affirmed, holding that "because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed." Pet. App. 9; *see also id.* at 16 ("Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this

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former President, and to exclude documents related to assets or transfers exclusively within Argentina. Pet. App. 8. Under the reasoning of the court of appeals below, however, there would be no principled basis for denying this discovery either.

determination does not affect discovery.").[15] The Second Circuit stated that the Discovery Order "does not implicate Argentina's immunity from attachment

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[15] Although NML never raised the argument in the district court, and therefore forfeited it, NML argued to the Second Circuit that the Republic had purportedly waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit properly did not discuss this point. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks omitted)). In any event, like every other court to consider the issue, the Second Circuit had previously held that even with a waiver of immunity, a court's power is still limited to what the FSIA permits. *See EM Ltd.*, 473 F.3d at 481 n.19 (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States . . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria." (internal quotation marks omitted)); *Aurelius Capital Partners, LP*, 584 F.3d at 129–30 (same). This uniform reading is compelled by the plain text of FSIA Section 1610(a), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . *if*—(1) the foreign state has waived its immunity from attachment in aid of execution or from execution." Stat. App. 13a–14a (emphasis added). A waiver of immunity accordingly opens the door to the limited universe of property defined in the preceding text of Section 1610(a); it does not expand that universe.

under the FSIA" because it does not literally "allow NML to attach Argentina's property" or "have any legal effect on Argentina's property at all." Pet. App. 15. Accordingly, the court of appeals concluded that "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party" and order discovery to the fullest extent of Federal Rule of Civil Procedure 69's purportedly "broad" scope. *Id.* at 13, 18.

The court acknowledged that "sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation," and thus that "a court must be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign defendant under the FSIA." *Id.* at 19; *see also id.* at 18 ("Where a plaintiff seeks to initially establish that the court has subject matter jurisdiction over a sovereign, discovery and immunity are almost invariably intertwined."). However, the Second Circuit found that these "concerns" are not present in the post-judgment context where a district court "indisputably ha[s] jurisdiction." *Id.* at 19; *see also id.* at 16 ("[T]he district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments.").

The court also reasoned that NML's service of the subpoenas on commercial banks, rather than Argentina itself, meant that the Discovery Order could not infringe Argentina's sovereign immunity because "the

banks' compliance with the subpoenas will cause Argentina no burden and no expense." *Id.* at 18. The Second Circuit stated that "[t]o the extent Argentina expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege and not a claim of immunity," which the FSIA "says nothing about." *Id.* at 19. The court concluded that "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others." *Id.* at 20.[16]

The Second Circuit thereafter denied the Republic's petition for rehearing en banc.

SUMMARY OF ARGUMENT

The FSIA is the sole, comprehensive scheme for obtaining and enforcing a judgment against a foreign state. Under the Act, even where a sovereign is subject to the jurisdiction of U.S. courts, its property remains presumptively immune from judgment enforcement unless it is both located in the United States and used for a commercial activity here. The Second Circuit erred in ruling that judgment creditors are nonetheless entitled to discovery in purported aid of execution that

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[16] Empowered by the court of appeals' decision, NML and other holdout creditors of the Republic subsequently sought, and were granted by the district court, discovery directed to the Republic itself concerning the same type of immune property as that upheld by the decision under review. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (S.D.N.Y. Sept. 25, 2013); Opinion, *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715 (S.D.N.Y. Mar. 7, 2013); *see also* Supplemental Brief of Petitioner at *1–4, No. 12-842 (Nov. 22, 2013).

is directed to property that falls far outside this narrow exception to immunity. The text, structure, and history of the FSIA make clear that such discovery is improper.

A. Prior to the enactment of the FSIA in 1976, foreign-state property was entitled to essentially absolute immunity from judgment enforcement, and creditors had to rely on foreign states to voluntarily satisfy judgments against them. The power of U.S. courts in actions against foreign states thus necessarily ended upon the entry of judgment, and supplemental proceedings in aid of executing such judgments, including conducting discovery in aid of execution, did not exist. The FSIA modified this framework by creating a presumption that, even where a foreign state has waived its immunity, all foreign-state property is immune from attachment and execution, unless, *inter alia*, it is used for a commercial activity in the United States. By partially lowering the barrier to judgment enforcement in this manner, Congress authorized enforcement proceedings *only* to the extent they are directed to that narrow category of sovereign property. For this reason, until the decision of the Second Circuit in this case, the courts of appeals had consistently held that any discovery in aid of executing on sovereign property must be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination. That is the correct rule to apply here.

The Second Circuit was wrong to interpret the fact that the FSIA does not expressly address discovery as granting civil plaintiffs sweeping discovery concerning foreign-state property—including military and diplomatic property, and property located outside the

United States, all of which is plainly beyond the enforcement power of U.S. courts—as if foreign states were the same as private parties. The FSIA's purported statutory silence with regard to discovery must be read as authorizing discovery consistent with the narrow exceptions to FSIA immunity, not as an invitation to disregard these limits and leave discovery concerning foreign-state property solely within the discretion of district courts. This conclusion is reinforced by both the presumption against abolishing protections afforded at common law, as well as the presumption against the extraterritorial application of statutes.

B. Limiting discovery in aid of execution against foreign states to property potentially subject to execution under the FSIA is consistent with the principles of foreign sovereign immunity, which the FSIA expressly directs courts to follow in all cases involving claims against foreign states. *See* 28 U.S.C. § 1602 (Stat. App. 1a) ("claims of foreign states to immunity" should be decided "in conformity with the principles set forth in this chapter").

First, the foundation of this Court's sovereign immunity jurisprudence is that foreign states are entitled to "grace and comity" in U.S. courts, which is premised on respect for the power, dignity and absolute independence of foreign sovereigns. Restricting post-judgment discovery to plausibly non-immune property properly balances these interests. In contrast, the Second Circuit's new rule authorizing plaintiffs to conduct worldwide "forensic examinations" of foreign-state property beyond the enforcement power of U.S. courts clearly disregards them.

Second, as numerous courts of appeals have recognized, FSIA immunity is not just immunity from suit and execution, but also from the attendant burdens, including discovery, of both pre- and post-judgment proceedings where no exception to immunity applies. The court of appeals' endorsement of blanket discovery of *all* sovereign assets, wherever located and regardless of their use, improperly subjects foreign states to the very burdens that the FSIA was enacted to prevent. These burdens exist whether the discovery is served on third parties or on the foreign state itself, as the inquiries are equally intrusive and will result in equally burdensome litigation costs regardless of the subpoena's recipient.

Third, the sovereign immunity that the United States affords foreign states is intended to protect the reciprocal interests of the United States abroad. As the United States itself has stated in no fewer than seven briefs in the past seven years, discovery orders such as the one entered below threaten U.S. interests by inviting foreign courts to similarly compel disclosure of all of the United States' property worldwide. The forced disclosure of information concerning property of the United States Government, including its military and diplomatic property, is a significant threat to the sovereign interests of the United States, just as the Discovery Order is to the sovereign interests of Argentina.

C. To the extent that resort to the legislative history is appropriate here, the Report of the House Judiciary Committee confirms that asset discovery in aid of judgment enforcement against a foreign sovereign must be limited to the narrow enforcement

exceptions created by the Act. That Report expressly states that the term "attachment in aid of execution" in Section 1610(a) of the FSIA broadly refers to *all supplemental proceedings* in aid of execution under Federal Rule 69, which necessarily includes discovery in purported furtherance of enforcing a judgment. The FSIA's limitations on the enforcement of judgments against foreign states accordingly apply to discovery in aid of such enforcement as well.

ARGUMENT

THE FSIA DOES NOT PERMIT U.S. COURTS TO ORDER DISCOVERY CONCERNING SOVEREIGN ASSETS THAT ARE INDISPUTABLY IMMUNE FROM EXECUTION AND ATTACHMENT IN AID OF EXECUTION

The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); *see also* 28 U.S.C. § 1602 (Stat. App. 1a). This includes providing "the sole basis for obtaining jurisdiction over a foreign state in federal court," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), as well as "the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). Sections 1609 through 1611 of the FSIA address the enforcement of judgments against foreign states, and provide that the only property over which a U.S. court may exercise its authority is property used for a commercial activity in the United States. *See* 28 U.S.C. § 1610(a) (Stat. App. 13a–14a). Military property is

further provided absolute immunity as set forth in Section 1611(b). Stat App. 19a–20a. Those provisions dictate the permissible scope of discovery in aid of judgment enforcement against a foreign sovereign under established principles of statutory construction, as well as the principles of comity, reciprocity, and immunity that the FSIA codified.

A. The FSIA Does Not Empower Courts to Order Discovery Concerning Immune Assets

1. The FSIA Confers No Authority to Compel the Discovery Demanded by the Subpoenas

Throughout the history of the United States, foreign sovereigns have been afforded immunity in U.S. courts. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008). This immunity was long regarded as virtually absolute, and courts therefore had no power to act with regard to foreign states. *Verlinden*, 461 U.S. at 480, 486. Beginning in 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, pursuant to which sovereigns were immune from suit for their governmental, but not commercial, acts. *Id.* at 487. Nonetheless, in the few cases where execution was even attempted, the Department of State and U.S. courts continued to recognize the absolute immunity of foreign-state property. *See, e.g., Weilamann v. Chase Bank*, 21 Misc.2d 1086, 1087–89 (N.Y. Sup. Ct. Westchester Cnty. 1959); *see also New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685–87 (S.D.N.Y. 1955); House Report at 17. Plaintiffs holding judgments against a foreign sovereign thus had no

choice but "to rely on the foreign state to pay the judgment voluntarily." *See Conn. Bank of Commerce v. Republic of Congo* ("*CBC*"), 309 F.3d 240, 252 (5th Cir. 2002); *accord De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984). Discovery in aid of enforcing a judgment against a foreign state was therefore necessarily nonexistent. *Cf. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 709 (2d Cir. 1930) (in suits against foreign sovereigns, "when judgment has been rendered and the liability judicially ascertained, the power of the courts ends and the sovereign is at liberty to determine for itself whether or not to pay the judgment."), *cert. denied*, 282 U.S. 896 (1931).

Against this backdrop, Congress enacted the FSIA. Consistent with immunity at common law, Congress codified the presumption that foreign sovereigns are immune from the jurisdiction of U.S. courts. 28 U.S.C. § 1604 (Stat. App. 2a). Congress then provided jurisdiction to adjudicate a foreign state's liability if a statutory exception to immunity from suit applies. *See* 28 U.S.C. §§ 1605, 1607 (Stat. App. 3a–10a). For cases in which a court properly exercised jurisdiction under one of these exceptions, Congress provided that the foreign state generally shall be "liable" to the same extent as a private party. 28 U.S.C. § 1606 (Stat. App. 9a).

Critically, Congress did *not* provide that foreign states, even where jurisdiction to adjudicate liability exists, shall be subject to judgment enforcement remedies to the same extent as private defendants. Instead, Congress preserved the separate and independent immunity afforded state property at

common law, thereby maintaining the distinction between a court's authority to: 1) enter a judgment against a foreign state; and 2) provide post-judgment relief in aid of enforcing such judgment. *See CBC*, 309 F.3d at 255–56 (FSIA enacted when "the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action"); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127–28 (9th Cir. 2010) ("Congress was aware that, although the restrictive theory of sovereign immunity from suit had become an accepted principle of international law by the time of the FSIA's enactment, the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject." (internal quotation marks omitted)). Congress enacted a presumption that sovereign property is immune, and provided courts with the limited authority to permit "execution" and "attachment in aid of execution" only on property that is both located in the United States and used for a commercial activity in the United States, and only if one of certain further narrow statutory exceptions to immunity applies. *See* 28 U.S.C. §§ 1609–10 (Stat. App. 13a–19a). These exceptions do not apply to military property, which remains absolutely immune as set forth in Section 1611(b)(2). Stat. App. 20a.

Congress thus limited the post-judgment powers a district court could exercise to "execution" and "attachment in aid of execution" on a narrowly circumscribed category of sovereign property. Congress did *not* place within the purview of U.S. courts sovereign property located anywhere in the world and used for any and all activities, including military and

diplomatic property. In providing for a presumption of immunity for foreign-state property separate and distinct from the immunity from suit—and with even narrower exceptions—Congress, when it partially lowered the previously unconditional barrier to post-judgment relief, gave no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority. As held by the Seventh, Fifth, and Ninth Circuits, discovery in aid of judgment enforcement should accordingly be limited to discovering facts necessary to answering the sole inquiry that the FSIA gives U.S. courts the authority to adjudicate—whether the property at issue is potentially property of the foreign state, used for a commercial activity in the United States. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011) (discovery limited to property that plausibly falls within an exception to execution immunity), *cert. denied*, 133 S. Ct. 23 (2012); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007) (discovery should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination" (internal quotation marks omitted)); *CBC*, 309 F.3d at 260 n.10 (same); *accord* U.S. *Amicus* Br. at *12 ("[T]he court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets.").

In light of the presumption of immunity codified in the FSIA, every circuit to address discovery with regard to a sovereign's claim to immunity from suit, including the Second Circuit itself, has adopted a

similarly focused framework. *See Butler v. Sukhoi*, 579 F.3d 1307, 1314 (11th Cir. 2009) (FSIA requires discovery concerning immunity from suit to be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination" (internal quotation marks omitted)); *First City, Texas–Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (same); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) (same); *see also In re Republic of the Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002) (discovery must "support [plaintiffs'] claim that the [FSIA] exceptions they assert apply in this case"); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("Relevance . . . is not enough. Because sovereign immunity is an immunity from suit . . . . a district court authorizing discovery to determine whether immunity bars jurisdiction must proceed with circumspection."); *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993) (discovery "should be limited to the essentials necessary to determining the preliminary question" of immunity); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) (same), *abrogated on other grounds by Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). As the Fifth Circuit explained in *Arriba*, this discovery limitation is necessary to properly balance the inherent "tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." 962 F.2d at 534; *First City, Texas–Houston N.A.*, 150 F.3d at 176 (same).

There is no coherent basis for holding that discovery concerning whether sovereign property is potentially

subject to execution should be any broader than the standard applied to determine whether a sovereign is potentially amenable to suit. The scope of immunity from attachment or execution is drastically narrower than the scope of immunity from suit. *Compare* 28 U.S.C. § 1605(a) (Stat. App. 3a–8a) *with id.* § 1610(a) (Stat. App. 13a–14a). Accordingly, at least the same circumspection that applies to the jurisdictional immunity determination should apply to the enforcement immunity inquiry, because in each case the question is whether there is a plausible basis that an exception to immunity exists under the applicable standard. Otherwise, for purposes of discovery, the two distinct inquiries—whether there is a plausible basis for overcoming immunity from suit under the standards of Section 1605, and whether a particular piece of property is subject to execution under the narrower immunity exceptions set forth in Section 1610—would be collapsed into one.

This Court followed the same approach of tying the scope of discovery to that of substantive immunity in suits against United States Government officials in *Harlow v. Fitzerald*, 457 U.S. 800, 817–18 (1982), which the Fifth Circuit cited in *Arriba*. 962 F.2d at 534 ("conflict" between a foreign state's entitlement to immunity and a plaintiff's need for limited discovery to determine whether an exception applies "is not unlike that attendant to claims that challenge domestic government officials' qualified immunity from suit"). In *Harlow*, the Court held that, prior to an immunity determination, "bare allegations . . . should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817. The Court reasoned that narrowly

limiting discovery to immunity determinations furthers the purposes underlying governmental immunity because "broad-ranging discovery" from government officials "can be peculiarly disruptive of effective government." *Id.* As the Court has explained, this immunity-based limitation on discovery constrains the normally broad discretion that district courts have over the discovery process. *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998) ("[T]he trial court *must* exercise its discretion in a way that protects the substance of the qualified immunity defense." (emphasis added)); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (instructing trial court on remand to dismiss action on immunity grounds without discovery if plaintiff failed to allege facts that would defeat immunity defense, and stating that if it did not dismiss at that point, "then discovery may be necessary" to resolve the immunity issue, but "[o]f course, any such discovery should be tailored specifically to the question of [defendant's] qualified immunity.").

2. The Second Circuit Erred in Designating the District Court a Worldwide Discovery Clearinghouse

At the heart of the court of appeals' decision is the flawed reasoning that because Sections 1609 through 1611 do not "expressly address" discovery, the FSIA has no bearing on the permissible scope of discovery against a foreign state, and the district court therefore could appropriately designate itself "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Aug. 30, 2011 Hr'g Tr. (Pet. App. 31) (emphasis added); Pet. App. 7, 15–16. That conclusion is wrong for at least three reasons.

First, the court of appeals ignored that the FSIA is an affirmative grant of jurisdiction that nowhere authorizes courts to permit inquiry into property located outside the United States and that, in no circumstance, could be executed upon to satisfy a judgment. *Amerada Hess Shipping Corp.*, 488 U.S. at 434; *Af-Cap Inc.*, 462 F.3d at 428. Indeed, it was only with the enactment of the FSIA that, for the first time in the history of the United States, U.S. courts were authorized to provide any post-judgment remedies to plaintiffs in aid of enforcing judgments against a foreign sovereign; before that, there were none. *See supra* at 3–7, 25–28. The question is therefore not, as NML and the court of appeals would have it, whether the FSIA expressly bars certain types of discovery in aid of execution, but to what extent the FSIA authorizes such discovery. The answer is plain from the structure of Section 1610 itself: Discovery in aid of judgment enforcement is limited to the property over which U.S. courts are authorized to act; *i.e.*, property located in the United States and used for a commercial activity here.

Second, reading such an expansive grant of authority into the FSIA's purported "silence" is directly contrary to the canon of construction that statutes are presumed not to abolish common law principles "unless the language of a statute be clear and explicit for this purpose." *Norfolk Redev. & Housing Auth. v. C. & P. Tel. Co.*, 464 U.S. 30, 35–36 (1983) (internal quotation marks omitted); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the

contrary is evident." (internal quotation marks omitted)); *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) ("Because [FSIA's immunity] exceptions are in derogation of the common law, we must not read them broadly. Statutes in derogation of the common law are narrowly construed."), *cert. denied*, 531 U.S. 1014; *In re Liberatore*, 574 F.2d 78, 85 (2d Cir. 1978) (applying presumption to preclude expansion of judicial power in light of "general historical limitations").

This canon applies with particular force when the claimed departure from the common law restricts sovereign immunity. The Court has recognized on numerous occasions, in the analogous context of suits against the United States, that a statute will only be read to limit sovereign immunity if and to the extent Congress has "unequivocally expressed" its intent to do so. *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (addressing the Privacy Act of 1974); *accord Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–61 (1999) (addressing Section 10(a) of the Administrative Procedure Act); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (addressing Section 504(a) of the Rehabilitation Act of 1973). Thus, the Court has routinely refused to grant various remedies to plaintiffs suing the United States that would ordinarily be available in suits against private defendants, in each case requiring a plain statement from Congress that immunity should be deemed not to apply, and strictly construing the applicable statute in concluding that the required express abrogation of immunity was not present. *See Cooper*, 132 S. Ct. at 1452–53 (refusing to permit award of damages for mental or emotional distress because it was "plausible" to read Congress's use of term "actual damages" as only authorizing relief for

pecuniary loss); *Blue Fox*, 525 U.S. at 262–64 (denying plaintiff right to obtain equitable lien on funds held by United States Government because "its goal is to seize or attach money in the hands of the Government as compensation," which does not fall within authorized remedy of specific performance); *Pena*, 518 U.S. at 192–93 (refusing to allow suit for money damages against executive agency because "[w]hatever might be said about the somewhat curious structure of the [statute's] liability and remedy provisions," it did not expressly abrogate immunity beyond the "narrow category" of violations identified). As discussed *supra*, Congress has indisputably *not* plainly stated its intent to derogate from sovereign immunity at common law by opening up foreign states to discovery that bears no relation to property over which U.S. courts could potentially exercise their enforcement powers, and the FSIA should therefore not be interpreted as doing so.

The Court's jurisprudence with regard to 42 U.S.C. Section 1983 is similarly instructive. Notwithstanding the observation that Section 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976), the Court has long recognized that the statute's "broad terms" should not be interpreted "to effect a radical departure" from sovereign immunities at common law, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012). Because certain public officials had traditionally enjoyed absolute immunity for their official actions, *Burns v. Reed*, 500 U.S. 478, 485–86 (1991), the Court has refused to interpret Section 1983 as somehow eliminating these immunities "by covert inclusion in the general language" of the statute, *Paulk*, 132 S. Ct. at 1502 (citing *Tenney v. Brandhove*, 341 U.S. 367, 376

(1951)). Instead, the Court has held that Section 1983 must be read as preserving immunities "well grounded in history and reason." *Paulk*, 132 S. Ct. at 1502; *see also Tower v. Glover*, 467 U.S. 914, 920 (1984) ("Section 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" (quoting *Imbler*, 424 U.S. at 421)); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." (internal quotation marks omitted)). This logic applies equally here: Throughout the history of the United States, discovery in aid of judgment enforcement against a foreign sovereign was unheard of, and, as set forth in detail below, longstanding principles of sovereign immunity strongly support permitting such discovery only to the extent of a U.S. court's enforcement powers under the FSIA. *See infra* Point B.

Third, the FSIA is plainly *not* silent on its territorial reach. Section 1609 of the FSIA states that "the property *in the United States* of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611," and Section 1610 states that "property *in the United States* of a foreign state . . . used for a commercial activity *in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States" if one or more of the listed exceptions in Section 1610(a)(1)–(7) are satisfied. *See* 28 U.S.C. §§ 1609–1610(a) (Stat. App. 13a–14a) (emphasis added); *compare* 28 U.S.C. § 1605(a)(2) (Stat. App. 3a) (authorizing *suit*, but not enforcement remedies, based

upon a commercial activity outside the United States with a direct effect in the United States). Congress expressed its intent that the FSIA apply domestically when it made these specific references to "the United States," and to nowhere else. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."), *cert. denied,* 552 U.S. 1231 (2008); *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011) ("only sovereign property that is in fact 'used for a commercial activity in the United States' may be subject to execution"); *Peterson*, 627 F.3d at 1131–32 (Iranian property located in France "immune from execution" because it is not "property in the United States").

The Court has rejected even the extraterritorial application of statutes that undeniably do not have the FSIA's explicit domestic enforcement focus based on the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted); *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (presumption against extraterritoriality "similarly constrain courts" in interpreting jurisdictional statutes because "the danger of unwarranted judicial interference in the conduct of foreign policy is

magnified . . . because the question is not what Congress has done but what courts may do"). This presumption precludes a district court from exercising its authority under the FSIA to serve as a "clearinghouse" for discovery concerning assets of a foreign sovereign, located exclusively in foreign countries, for the claimed purpose of enforcing judgments in foreign countries. *See Kiobel*, 133 S. Ct. at 1665–69 (looking to historical background in concluding that Congress did not intend ATS to apply extraterritorially).

The court of appeals was therefore wrong to conclude, citing, *inter alia*, this Court's decision in *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867), that supplemental proceedings directed to immune sovereign property are "essential" to federal jurisdiction because courts' "judicial power would [otherwise] be incomplete and entirely inadequate." Pet. App. 16.[17] The judicial power of courts to enforce their judgments against sovereigns is "incomplete" because Congress decided to afford sovereign property broad immunity from execution, subject only to narrow exceptions. In the post-judgment context, where Rule 69 provides the basis for all "proceedings supplementary to and in aid of a judgment or execution," including discovery in aid of execution, the

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[17] The court of appeals also relied on its own decision in *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002), but that decision recognized that subject matter jurisdiction over a foreign sovereign continues through post-judgment enforcement proceedings only "to the extent those procedures and responsibilities are related to [the sovereign's] commercial activities in the United States," *id.* at 53.

Rule specifically states that "a federal statute," here the FSIA, "governs" where applicable. Fed. R. Civ. P. 69(a)(1) (Stat. App. 20a–21a). Thus, extending post-judgment supplemental jurisdiction to permit enforcement efforts that are inconsistent with the immunity framework set forth in the FSIA, as the court of appeals did, is clearly not "essential" to maintain the adequacy of judicial power within the meaning of *Riggs*, but would extend it beyond the limited power Congress has authorized.

B. Court-Ordered Discovery of Foreign-State Property Infringes Sovereign Immunity and the Principles Behind It

The discovery compelled by the district court and endorsed by the court of appeals is not only contrary to the structure and logic of the FSIA, but also to the principles of sovereign immunity that it codified, which the Act specifically commands U.S. courts to follow. *See* 28 U.S.C. § 1602 (Stat. App. 1a). As the Court has explained, Section 1602 of the FSIA describes the Act's purposes. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). Congress further instructed in Section 1602 that all "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter*." Stat. App. 1a (emphasis added);[18] *see also Schooner Exchange v. McFaddon*, 11

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[18] The Court has on several occasions looked to Section 1602 for guidance in interpreting the scope and meaning of the FSIA. *See Samantar*, 506 U.S. at 313, and n.7, 319-20 (citing Section 1602 as evidence of the Act's primary purposes); *id.* at 329 (Scalia, J., concurring) (disagreeing with majority's reference to legislative history because "the *enacted* statutory text itself includes findings

U.S. (7 Cranch) 116, 135–36 (1812) (the resolution of claims to sovereign immunity should "conform to those principles of national and municipal law by which it ought to be regulated").

The courts below disregarded these "principles." Despite Section 1602's mandate that the immunity principles laid down in the statute should inform all "[c]laims of foreign states to immunity" in United States courts, the district court and the Second Circuit treated them as irrelevant, and compelled Bank of America and BNA to produce information concerning all assets of the Republic, wherever located in the world and regardless of their use. Indeed, the district court authorized a "forensic examination" of the Republic's international "financial circulatory system," designating itself as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Pet. App. 31, 41, 60 (emphasis added). Among other things, the information demanded concerned: 1) military entities, such as the Republic's Ministry of Defense, Military Headquarters, and Secretary of Intelligence; 2) diplomatic entities, such as the Republic's Ministry of Foreign Affairs; 3) the Republic's deceased former President, as well as its current President; and 4) dozens of legally separate

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and a declaration of purpose" (emphasis in original)); *Republic of Austria v. Altmann*, 541 U.S. 677, 697 (2004) (relying on use of "henceforth" in Section 1602 in concluding that the Act applies retroactively); *id.* at 717 (Kennedy, J., dissenting) (agreeing that Section 1602 codifies the FSIA's purpose). The clear function of Section 1602 is to instruct courts to apply the basic principles of the FSIA to issues of both procedure and substance that the Act does not explicitly address, but that implicate the same immunity concerns reflected in the Act.

agencies or instrumentalities of the Republic. *See* NML Notice of Subpoena served on Bank of America, N.A., dated Mar. 10, 2010 (JA 47, 57–76); NML Notice of Subpoena served on Banco de la Nación Argentina, dated June 14, 2010 (JA 84); Persons or Entities Falling Under the Definition of "Argentina" (JA 92–105). The Discovery Order upholding these extraordinary demands is an unprecedented affront to sovereign immunity that should not be endorsed by this Court.

First, the Discovery Order is irreconcilable with a central tenet of foreign sovereign immunity that foreign states are entitled to "grace and comity" in U.S. courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Sovereign immunity derives from "respect for the 'power and dignity' of the foreign sovereign," *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 367, and n.7 (1955), and is "premised upon 'the perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 137)). Comity thus requires that U.S. courts tread cautiously when exercising judicial power over foreign sovereigns, and avoid affronts to the sovereignty of a foreign state wherever possible. *Id.* at 866 ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.").

As the Court recently explained in *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014), broad interpretations of the jurisdiction of U.S. courts raise

serious risks to international comity. In *Daimler*, comity was harmed because lower courts' expansive views of general personal jurisdiction had resulted in "objections" from foreign governments and "impeded negotiations of international agreements." *Id.* The present case is *a fortiori*: The exercise of judicial power with regard to the worldwide property of a foreign state is an even more significant affront to international comity. *Cf. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (noting that the Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with coordinate interest in the litigation," and instructing courts to "demonstrate due respect" in discovery proceedings "for any sovereign interest expressed by a foreign state"); Restatement (Third) of Foreign Relations Law of the United States § 442, Reporters' Notes 1, at 354 (1986) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

It is precisely for this reason that the United States Government has filed at least seven briefs as *amicus curiae* since 2007—including most recently in this proceeding in support of the Republic's petition for a writ of certiorari—in which it has presented its view that the FSIA restricts discovery concerning the assets of a foreign sovereign to property falling within the limitations set forth in Section 1610, and that failing to recognize this restriction could cause grave harm to the

foreign relations of the United States.[19] *See also Butler v. Sukhoi*, 579 F.3d 1307, 1314 (11th Cir. 2009) (relying on "principles of comity underlying the FSIA" in requiring district courts to "balance the need for discovery to substantiate exceptions" to immunity against need to protect sovereign's "legitimate claim to immunity from discovery").

The Discovery Order is a plain derogation of comity. The insult to comity of a court ordering a worldwide "forensic examination" of all assets of a foreign state —including the property of a nation's military, its diplomatic core, and its highest officials—cannot be overstated. This is confirmed by the numerous treaties, conventions, and common law immunities on the topic.[20] Only slightly less insulting is a worldwide

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[19] *See, e.g.*, U.S. *Amicus* Brief at *12, *22; Brief for the United States as *Amicus Curiae* at *11-12, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2012 WL 1891593 (May 25, 2012); Brief for the United States of America as *Amicus Curiae* in Support of Reversal at *9-10, *NML Capital, Ltd. v. Banco Central de la República Argentina*, No. 10-1487-cv(L), 2010 WL 4597226 (2d Cir. Nov. 3, 2010); Brief of the United States as *Amicus Curiae* in Support of Appellant at *28–29, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107 (D.C. Cir. Oct. 7, 2010); Brief for the United States as *Amicus Curiae* at *13-15, *Rubin v. Islamic Republic of Iran*, No. 08-2805, 2009 WL 8132813 (7th Cir. June 26, 2009); Brief of the United States of America as *Amicus Curiae* in Support of Affirmance at 24 n.5, *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir. June 25, 2009); Third Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03-cv-9370 (N.D. Ill. Nov. 16, 2007).

[20] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 9; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; United

"forensic examination," at the behest of a private party, of the property of dozens of legally distinct agencies or instrumentalities that are presumed separate from the Republic and entitled to their own sovereign immunity. *See* 28 U.S.C. § 1603 (Stat. App. 1a–2a); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983). One would be hard-pressed to imagine a more intrusive encroachment into the internal affairs and sovereignty of a foreign state than the unprecedented subpoenas below, nor one more calculated to create the foreign relations irritations that the principle of comity underlying the FSIA is directed at preventing.

Second, endorsing such discovery would eviscerate the principle that immunity is intended to shield foreign states from the burdens of litigation. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (FSIA is "designed to 'give foreign states and their instrumentalities some protection from the inconvenience of suit'") (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), *superseded on other grounds by* 28 U.S.C. § 1610(g)(1)). As the courts of appeals have consistently recognized, the FSIA's framework of presumptive immunity makes clear that Congress intended not merely to protect foreign states from the ultimate relief sought by U.S. plaintiffs—*i.e.*,

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Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004; United Nations Convention on the Law of the Sea Art. 29, 32, Dec. 10, 1982, 1833 U.N.T.S. 3; International Law Association, Report of the Sixty-Sixth Conference held at Buenos Aires at 493, Aug. 14–20, 1994; *Samantar*, 560 U.S. at 321 (discussing common law sovereign immunity for high government officials).

a judgment or execution thereon—but from the costs and burdens of the legal proceedings themselves. *See, e.g.*, *Peterson*, 627 F.3d at 1132 ("The statutory text, structure, legislative history, and case law suggest that *sua sponte* consideration" of the FSIA's attachment and execution immunity "serves the . . . goal[] of the FSIA . . . [of] sparing [foreign states] the inconvenience of litigation."); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("The position of the State Department, taken in hearings on the bill which became the [FSIA] and repeated in a memorandum that the Department has filed with this court in the present case, is that 'the purpose of sovereign immunity in modern international law . . . is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts.'" (citation omitted)); *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063 (10th Cir. 2010) ("The immunity provided under the FSIA protects foreign sovereigns from all the burdens of litigation, including the general burden of responding to discovery requests."); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990).

Discovery in aid of execution untethered to any immunity determination or, as here, directed to *categorically* immune property, improperly subjects a foreign state to the costs and inconveniences of litigation in the same way as does discovery concerning

a foreign state's liability before an exception to jurisdictional immunity has been established. As the Seventh Circuit correctly explained in *Rubin*, "[d]iscovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets," and "[o]ne of the purposes of the [execution] immunity codified in § 1609 is to shield foreign states from these burdens." 637 F.3d at 796–97. It is even more important to limit discovery in the post-judgment context, because the FSIA's intention to "spare foreign states . . . from the cost and inconvenience of trial" "appl[ies] *more strongly* in the context of immunity from execution," based on foreign relations concerns and principles of international law that prompted Congress to draft the exceptions to immunity from execution "more narrow[ly] than the exceptions from immunity from suit." *Peterson*, 627 F.3d at 1127–28 (emphasis added); *id.* at 1128 ("In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states . . . .").

The court of appeals held that the subpoenas were proper because they would cause the Republic "no burden and no expense," since they were served on third-party banks rather than the Republic itself. Pet. App. 19. This reasoning cannot be justified. Whether the discovery is served on third parties or the Republic, NML's "forensic examination" of the Republic's international "financial circulatory system," Pet. App. 41, 60, including detailed financial information concerning the Republic's current and deceased former Presidents, military and diplomatic entities, and

hundreds of entities that are presumed separate, indisputably qualifies as a litigation burden. It is the Republic that must attempt to protect the financial privacy of these persons—it cannot simply stand with arms folded while its high officials and core sovereign functions are being subjected to this kind of assault, any more than the United States would stand by silently if someone in another country tried to subpoena the bank accounts of the President, Congressional leaders, or members of the Judicial Branch.

Moreover, discovery served on third parties but concerning assets of a foreign state can and will result in a myriad of additional "inconvenience[s]" to the foreign state, *Pimentel*, 553 U.S. at 865, including by: a) forcing the sovereign to defend itself in subsequent litigation (the Republic has already borne the cost of litigating in Swiss courts NML's improper *ex parte* attachments of diplomatic bank accounts as a result of the Discovery Order); b) yielding information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery; and c) forcing third parties to deem their burdens of discovery as a cost of doing business with a sovereign state, and to either pass those costs on to the state or refuse to do business with that state. *Accord* U.S. *Amicus* Br. at *17. Such costs are the logical result of permitting judgment creditors the unfettered right to use the ordinarily "broad post-judgment discovery" procedures under Rule 69 to obtain discovery concerning assets of a foreign state as if it were a private person and as if such discovery is bound only by the discretion of the district court, Pet. App. 13, which in the present case imposed no bounds

at all, *see id.* at 9 (because "Argentina's sovereign immunity is not infringed," "[t]he district court therefore did not abuse its discretion").

Finally, the very history of this case demonstrates the artificiality of trying to limit the Second Circuit's decision to discovery directed to third parties. No sooner did the Second Circuit enter its decision than NML and other holdout creditors returned to the district court to obtain discovery from the Republic itself of essentially the same scope as that upheld by the decision under review. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 25, 2013); Opinion, *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715 (TPG) (S.D.N.Y. Mar. 7, 2013); *see also* Supplemental Brief of Petitioner at 4, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (Nov. 22, 2013). As NML's counsel noted in those subsequent proceedings, the court of appeals broadly held that the FSIA "does not have anything to do with post judgment discovery" regardless of whether that discovery is sought from a foreign state or a third party. Hr'g Tr. at 3:13–17, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 3, 2013).

Third, the court of appeals failed to take into account that the FSIA is intended to protect the reciprocal interests of the United States. *See Peterson*, 627 F.3d at 1127–28 (citing *Nat'l City Bank of N.Y.*, 348 U.S. at 362 (foreign sovereign immunity based in part on "reciprocal self-interest")); Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*,

87 Geo LJ 675, 691 (1999) ("As a practical matter, considerations of reciprocity compelled foreign sovereign immunity; nations expected to receive foreign sovereign immunity as well as to accord it."). Because "some foreign states base their sovereign immunity decisions on reciprocity," *i.e.*, the treatment that U.S. courts provide to foreign sovereigns, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), the Court's interpretation of the FSIA can be expected to have a tangible impact on the treatment of the United States Government abroad, *see In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 125 n.52 (D.D.C. 2009) ("Another troubling aspect of litigation under the FSIA terrorism exception is that it appears to have spurred on reciprocal lawsuits in the courts of Iran against the United States for actions allegedly committed against Iran and its citizens by United States agencies and officials."). *Accord* U.S. *Amicus* Br. at *11–12 ("The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations," and "a United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad."); *cf.* House Report at 9 ("Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.").

Interpreting the FSIA to permit discovery into the worldwide property of a foreign state would be equivalent to a Chinese court ordering the U.S. embassy in China or Bank of America Asia Pacific to

produce information on the United States Government's worldwide assets, including military property. *Cf. All Am. Trading Corp. v. Cuartel Gen. Fuerza Aerea Guardia Nacional de Nicaragua*, 818 F. Supp. 1552, 1556 (S.D. Fla. 1993) (FSIA protection for military property intended to avoid "the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act"). Such an interpretation of the FSIA would thus directly threaten national security, privacy interests, and the sovereignty of the United States itself, just as it has for Argentina. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–69 (considering reciprocal risk to U.S. citizens of extraterritorial application of Alien Tort Statute as "serious foreign policy consequence[]" that cautioned against such application). Congress cannot have intended to permit this result, and the reciprocal invasion of core sovereign assets, through any purported silence in the FSIA.

C. The FSIA's Legislative History Supports Restricting Discovery in Aid of Judgment Enforcement to the Limits of Sections 1610 and 1611

NML pressed below and in opposition to *certiorari* review that the legislative history of the FSIA indicates that the statute places no limitation on discovery in aid of judgment enforcement, because an isolated remark from the House Judiciary Committee Report states that "[t]he bill does not attempt to deal with questions of discovery." As an initial matter, it is axiomatic that "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce*

of U.S. v. Whiting, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). Nowhere is that principle more salient than where, as here, a private party seeks to invade a sovereign interest. In those circumstances, the courts must be guided by what Congress has said, and not by what a particular legislator has said in a congressional report. *See supra* at 33–35; *see also, e.g.*, *Samantar*, 560 U.S. at 328 (Scalia, J., concurring) (disagreeing with reliance on the FSIA's "House Committee Report that we have no reason to believe was read (much less approved) by the Senate—or, indeed, by the Members of the House who were not on the Committee—or even, for that matter, by the members of the Committee, who never voted on the Report."). For the reasons set forth above, the clear language, structure, and history of the FSIA establish that the Act does indeed restrict the permissible scope of post-judgment discovery.

However, to the extent that consideration of the statute's legislative history is appropriate, this snippet does not bear the weight NML has placed on it. The comment appears in a discussion of Section 1606, which, as noted above, addresses a foreign state's *liability*. It does not address a sovereign's immunity from post-judgment proceedings in aid of attachment or execution. *See Rubin*, 637 F.3d at 797 (emphasizing "critical error" of reading Section 1606 to address discovery in aid of judgment execution). Thus, at most the language quoted by NML could be interpreted as suggesting that *liability* discovery should follow the procedures set forth in the Federal Rules. *See* Fed. R. Civ. P. 26, 37, 45.

When the House Judiciary Committee addressed post-judgment immunity, on the other hand, the Committee explained that "[t]he term 'attachment in aid of execution' [in Section 1610(a)] is intended to include attachments, garnishments, and *supplemental proceedings* available under applicable Federal or State law to obtain satisfaction of a judgment." House Report at 28 (citing Fed. R. Civ. P. 69) (emphasis added). This is consistent with the Executive Branch's section-by-section analysis of the draft bill that it submitted to Congress in 1975. *See* Section-by-Section Analysis, 15 *Int'l Leg. Mat.* 102, 114 (1976) (similarly defining "attachment in aid of execution" as including "supplemental proceedings"). The Committee and the Executive Branch cited Rule 69, which principally concerns "Execution," as its title indicates, but also addresses "proceedings supplementary to and in aid of judgment or execution." One such supplementary proceeding is discovery "[i]n aid of the judgment or execution." Fed. R. Civ. P 69(a)(2) (Stat App. 21a); *see also* Black's Law Dictionary 1608 (4th ed. 1951) (defining supplementary proceedings as "[p]roceedings supplementary to an execution, directed to the discovery of the debtor's property and its application to the debt for which the execution is issued."); Ballentine's Law Dictionary 1242 (3d ed. 1969) (defining supplemental and supplementary proceedings as "[a] proceeding . . . whereunder the plaintiff is entitled to examine the judgment debtor and third persons for the purpose of obtaining information concerning property owned by the debtor which may be applied in payment of the judgment."). Even the court of appeals rested its decision on its view that the Discovery Order fell within the district court's authority to conduct "supplementary proceedings."

Pet. App. 16 (authority to grant post-judgment discovery derives from authority to conduct supplementary proceedings).

The House Judiciary Committee Report thus strongly supports the conclusion that Congress did intend for Section 1610(a) to limit post-judgment discovery, along with all other supplemental proceedings in aid of judgment enforcement. The principal constraint under that section is, of course, that post-judgment remedies such as asset discovery are permitted only with regard to property used for a commercial activity in the United States. *Accord* Brief of the United States as *Amicus Curiae* in Support of Appellant at *27–28, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107 (D.C. Cir. Oct. 7, 2010) (Congress's authorization of supplemental proceedings means that "post-judgment discovery is permitted under § 1610(a)," but "that discovery is subject to the same limitations that apply to other coercive measures under the statute"). Indeed, that is the only property that Congress deemed to be within the purview of U.S. courts when providing a partial lowering of the longstanding bar on all post-judgment relief. 28 U.S.C. § 1610(a) (Stat. App. 13a–14a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

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28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in

immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

> **(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> **(B)** any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other

international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this

subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been

privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary

of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default

judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of

judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

> **(1)** the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> **(2)** the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-

1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.--The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.--

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.--Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution,

upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.-- Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign

government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Fed. R. Civ. P. 69. Execution

(a) In General.

(1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

N.Y. C.P.L.R. § 5223. Disclosure

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") limits a judgment creditor's entitlement to post-judgment discovery in aid of execution when: (1) the FSIA's text does not limit post-judgment discovery; (2) the discovery is served on third-party commercial banks that have not claimed immunity; and (3) the foreign-state judgment debtor has irrevocably waived any immunity that it might otherwise possess from post-judgment execution or legal process.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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BRIEF FOR RESPONDENT

Respondent NML Capital, Ltd. respectfully submits that the judgment of the court of appeals should be affirmed.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULE

The relevant constitutional provisions, statutory provisions, and rule are reproduced in the addendum to this brief.

INTRODUCTION

Argentina and the government do not contest that the Federal Rules of Civil Procedure entitle judgment creditors to broad post-judgment discovery in aid of execution; that the FSIA does not address post-judgment discovery; that NML holds valid judgments against Argentina; that the subpoenas at issue were served on third parties that have not claimed sovereign immunity, not on Argentina itself; or that Argentina has broadly waived, in the bonds from which this case arises, any immunity from post-judgment execution or legal process. The question before this Court, therefore, is whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") bars the post-judgment discovery sought here despite *each* of these points. The answer is no.

The FSIA's text provides no basis for limiting the post-judgment discovery routinely available to judgment creditors. The FSIA provides immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610. But the statute says nothing about post-judgment discovery, and discovery is neither attachment nor execution. Indeed, Ar-

gentina and the government concede that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15. That concession should end this case: The Court does not adopt a statutory construction with "no basis or referent in [the statute's] language." *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). The statutory text alone thus compels the conclusion that the FSIA does not limit post-judgment discovery.

The structure of the FSIA confirms that textual conclusion. When Congress provided immunities in the FSIA—from suit and from post-judgment attachment and execution—it specified the precise scope of those immunities to make clear when they would (and would not) apply. If Congress had wanted to provide immunity from post-judgment discovery, it would likewise have specified the scope of (and limitations on) such immunity. Congress's decision not to do so makes clear that it did not intend to provide any such immunity. Similarly, when Congress wanted to override normal rules of procedure in FSIA proceedings, it did so in the FSIA's text. Yet nowhere does the FSIA displace the ordinary rules for post-judgment discovery under the Federal Rules of Civil Procedure.

The conclusion that the FSIA does not limit post-judgment discovery is further supported by two acknowledged purposes of the statute. *First*, Congress sought to achieve clarity in the FSIA regarding the scope of foreign sovereign immunity. Before the FSIA was enacted, immunity determinations were shrouded in uncertainty because the standards governing them were unclear and inconsistently applied. The FSIA was Congress's attempt "to remedy these problems" by establishing a "comprehensive" frame-

work for resolving all foreign sovereign immunity claims in U.S. courts. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). But the FSIA provides such clarity only if courts make immunity determinations based on the standards actually set forth in its text. Imposing an atextual limitation on discovery would undermine the clarity and certainty that Congress sought to achieve.

Second, the FSIA reflects a delicate balance struck by Congress between the interests of foreign states and the interests of those with claims or judgments against those states. Congress was acutely aware of foreign-relations concerns, and thus provided robust immunity to foreign states in the FSIA, but it did not do so without limit. Instead, Congress understood that U.S. courts have a vital interest in providing a forum for resolving disputes against foreign states and for allowing judgment creditors to enforce any judgments that they secure, and it limited the scope of immunity accordingly. Reading immunities into the FSIA that Congress did not create would upset the balance that Congress drew.

Against all of this, Argentina and the government embrace the sovereign immunity regime that preceded the FSIA; rely on a newly minted clear statement rule that would presume the Federal Rules are inapplicable in FSIA proceedings unless Congress specifically provided otherwise; and invoke foreign-policy justifications for reading into the FSIA a discovery limitation not found in its text. The Court should reject these arguments.

The FSIA was enacted precisely because of the unreliability and inconsistency of the pre-FSIA common law—and because it so often departed from the restrictive approach to sovereign immunity that

Congress wanted U.S. courts to apply. Thus, "the [FSIA]—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010).

Argentina's and the government's clear statement rule—that Congress was required to accept the background Federal Rules on discovery for those rules to apply—gets the law backwards. As this Court has held, federal law should not be read to displace the Federal Rules of Civil Procedure *unless* the federal law contains a "plain statement of a pre-emptive intent." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 539-40 (1987). Neither Argentina nor the government claims that Congress made any such statement in the FSIA.

To the extent that Argentina and the government invoke foreign-policy concerns, they ignore that the text of the FSIA addresses the policy concerns that Congress chose to address. For this reason, the Court has already rejected the argument that the Federal Rules governing discovery do not fully apply in the face of strong foreign-relations interests. *See Société Nationale*, 482 U.S. at 539-40. And the Court has also refused to "articulate specific rules"—not set forth in the Federal Rules—to limit discovery in light of such interests. *Id.* at 546.

Yet even if this Court were to hold that the FSIA imposes some limitations on post-judgment discovery, it should nonetheless uphold the district court's discovery order on either of two grounds. *First*, even if the FSIA limits post-judgment discovery against *sovereigns*, it does not limit such discovery against *non-sovereigns*, including the third-party banks sub-

ject to the subpoenas at issue here. *Second*, even if the FSIA could be deemed to limit discovery against non-sovereigns in certain circumstances, NML would still be entitled to the requested discovery because Argentina waived any immunity from post-judgment discovery in aid of execution.

For each of these reasons, the court of appeals' judgment should be affirmed.

STATEMENT

1. "[F]oreign sovereigns have no right to immunity in our courts." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688 (2004). As this Court observed in *Schooner Exchange* v. *McFaddon*, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." 11 U.S. (7 Cranch) 116, 136 (1812). *Schooner Exchange* also recognized that all sovereigns had "implicitly agreed," "as a matter of comity," not to assert jurisdiction "over other sovereigns in certain classes of cases." *Altmann*, 541 U.S. at 688. Thus, the United States had "relax[ed]" its "absolute and complete jurisdiction" over foreign sovereigns "in cases under certain peculiar circumstances." *Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

Because foreign sovereign immunity rested, from the beginning, on political considerations rather than legal restrictions, the political branches long took primary responsibility for determining whether foreign states were immune from suit in U.S. courts. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). During that time, a foreign state could ask the State Department to recognize its claim for immunity by filing a "suggestion of immunity" with the court. *Ex parte Republic of Peru*, 318 U.S. 578, 581 (1943). For more than a century and a

half after the Founding, the Executive Branch generally asked U.S. courts to extend immunity "in all actions against friendly foreign sovereigns." *Verlinden*, 461 U.S. at 486. Consistent with this Court's direction that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow," *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), U.S. courts were required to accept the State Department's suggestions as "conclusive" and "to proceed no further" with the case, *Ex parte Peru*, 318 U.S. at 588-89.

At the same time, this Court emphasized that "[i]t is . . . not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. Thus, if the State Department did not file a suggestion, or if the sovereign asserted its immunity without any intervention by the Department, courts would evaluate whether the claim satisfied the immunity principles typically applied by the State Department. *See id.* at 34-36; *see also Ex parte Peru*, 318 U.S. at 587-88. Applying these principles, courts would exercise jurisdiction over foreign states in a variety of circumstances, including when a foreign state consented to becoming a party, waived its immunity from suit, or failed to follow settled procedures for asserting immunity, and when the immunity claimed was not one recognized by the political branches. *See, e.g.*, *Porto Rico* v. *Ramos*, 232 U.S. 627 (1914) (consent); *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916) (waiver); *In re Muir*, 254 U.S. 522, 533 (1921) (failure to follow "the correct practice" for asserting immunity); *Hoffman*, 324 U.S. at 38 (immunity not recognized by political branches). This history belies Argentina's suggestion that courts historically "had *no*

power to act with regard to foreign states." Pet. Br. 26 (emphasis added).

Over time, the international community became disenchanted with the "absolute" theory of sovereign immunity and increasingly embraced a "restrictive" theory. Under the restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. The State Department announced in 1952 that it was adopting the restrictive theory. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952); *see also, e.g.*, *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010).

"[A]pplication" of the State Department's change in policy, however, "proved troublesome." *Verlinden*, 461 U.S. at 487. The new policy, which "was not initially enacted into law," *ibid.*, "threw immunity determinations into some disarray," *Samantar*, 130 S. Ct. at 2285 (internal quotation marks omitted). Courts did not uniformly adhere to the restrictive theory, and some upheld immunity claims even when the restrictive theory would not have applied. *See Verlinden*, 461 U.S. at 487-88. More troublingly, even after the State Department changed its policy, the "standards" "governing" its immunity determinations were "neither clear nor uniformly applied." *Id.* at 488. As in the past, many immunity claims filtered through the State Department, *see id.* at 487, and courts continued to heed the Department's suggestions, *see Altmann*, 541 U.S. at 690. But the State Department did not faithfully apply the re-

strictive theory. *See Verlinden*, 461 U.S. at 487. Instead, it sometimes filed suggestions based on "political," *Altmann*, 541 U.S. at 690, "diplomatic," *Verlinden*, 461 U.S. at 488, or other "nonlegal" considerations, H.R. Rep. No. 94-1487, at 9 (1976).

2. "Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA." *Samantar*, 130 S. Ct. at 2285. Embracing the restrictive theory, Congress sought in the FSIA "to clarify" the "standards" governing immunity decisions and "to 'assur[e] litigants that . . . [such] decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (first alteration and ellipses in original). "To accomplish these objectives," the FSIA contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Ibid.*

Under Section 1604 of the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." 28 U.S.C. § 1604; *see also id.* § 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Among other exceptions, the FSIA includes a waiver provision: "A foreign state shall not be immune from the jurisdiction of courts of the United States" where "the foreign state has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1). If that provision—or any other exception to a foreign state's jurisdictional immunity from suit—applies, then "a federal district court may exercise subject-matter jurisdiction," *Verlinden*, 461 U.S. at 489, and (except for punitive damages) "the foreign state shall be lia-

ble in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606.

Separate, non-jurisdictional provisions of the FSIA govern post-judgment attachment and execution. Section 1609 provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611." 28 U.S.C. § 1609. Section 1610, in turn, provides several exceptions to attachment immunity, including circumstances when property is used for commercial activity in the United States. *See id.* § 1610(a).

By their terms, neither Section 1609 nor Section 1610 extends attachment immunity to property outside the United States. Instead, the immunity from attachment (if any) of such assets is a question of foreign law, to be decided by foreign tribunals. *See, e.g.*, *NML Capital Ltd.* v. *Bank for Int'l Settlements*, Bundesgericht [BGer] [Federal Supreme Court] July 12, 2010, No. 5A_360/2010 (Switz.) (C.A. J.A. 862-93) (applying Swiss law).

Although Sections 1609 and 1610 define in detail the contours of the attachment immunity provided by the FSIA, those provisions say nothing about discovery. The only provision of the FSIA addressing discovery permits stays in some cases involving terrorism where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g)(1). Otherwise, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011); *see also, e.g.*, H.R. Rep. No. 94-1487, at 23 (noting that the FSIA

"does not attempt to deal with questions of discovery").

The federal courts' "normal discovery apparatus" (*FG Hemisphere*, 637 F.3d at 378) allows for "broad post-judgment discovery" to aid parties seeking to execute on judgments in their favor. Pet. App. 13. Federal Rule of Civil Procedure 69(a)(2) provides that, "[i]n aid of . . . judgment or execution, [a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." New York law (applicable here) similarly provides that a "judgment creditor may compel disclosure of *all* matter relevant to the satisfaction of the judgment." N.Y. C.P.L.R. § 5223 (emphasis added).

3. Argentina "has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what . . . might [be] term[ed] a diplomacy of default." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). Its latest contribution began in December 2001, when it violated its agreements with creditors by declaring a moratorium on payments on its external debt. Pet. App. 3. That default was then the largest sovereign debt default in history. *See, e.g.*, Sophie Arie & Andrew Cave, *Argentina Makes Biggest Debt Default in History*, Telegraph, Dec. 24, 2001.

In 2004, Argentina announced a debt restructuring plan. Rather than a "consensual" restructuring, Pet. Br. 10, Argentina imposed a take-it-or-leave-it plan that provided bondholders with a recovery of only 25 to 29 cents on the dollar. *See* Hal S. Scott, *Sovereign Debt Default: Cry for the United States,*

Not Argentina 3-4 (Wash. Legal Found., Working Paper No. 140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf. Argentina imposed that 71-to-75-cent "haircut" even though it was able to pay substantially more. *See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 321 (2005). And to frustrate creditors that would pursue remedies in court, Argentina spirited assets out of the United States and began structuring its finances to avoid attachment under the FSIA or the laws of foreign jurisdictions. *See The Government Is Protecting Itself from Attachment*, La Nación, Feb. 5, 2004 (C.A. J.A. 988-92).

Argentina's economic fortunes have since improved. *See, e.g., Argentina Says Can Rebuild Reserves Used to Pay Debt*, Reuters, Mar. 7, 2012. Despite that prosperity, however, Argentina "has not acted honestly and in good faith" to satisfy its debts. *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010), *vacated on other grounds*, *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011). Although Argentina insists that it "did not repudiate [its] debt" and has "treat[ed] its private creditors equitably," Pet. Br. 10, it has instead engaged in a pattern of "willful defiance" of its legal obligations. *NML Capital, Ltd.*, 652 F.3d at 196 (internal quotation marks omitted).

4. NML Capital, Ltd. owns beneficial interests in bonds on which Argentina defaulted in 2001. To persuade investors to buy its bonds despite its checkered credit history, Argentina had comprehensively waived its sovereign immunity. It consented to application of New York law and to the jurisdiction of

the courts of that State. Pet. App. 4 & n.1. Concerning immunity from enforcement of judgments, Argentina further promised:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity . . . from attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted . . . (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

J.A. 106.

Invoking Argentina's waiver of immunity and consent to jurisdiction, NML brought eleven actions in the United States District Court for the Southern District of New York based on those bonds. The district court entered five money judgments in NML's favor, totaling (with interest) more than $1.6 billion. *See* Pet. App. 4. The district court also granted summary judgment to NML as to principal in the six other actions, in which NML's claims total (again with interest) more than $900 million. *See ibid.* Although "Argentina does not dispute . . . that the judgments against it are valid and enforceable," *id.* at 18—and although it claims not to have "repudiate[d] [its] debt," Pet. Br. 10—it has not paid anything on those judgments, *see* Pet. App. 4.

a. Since 2003, NML has pursued discovery regarding Argentina's assets. *See* Pet. App. 4-5. As part of that discovery, NML served subpoenas in 2010 on two non-sovereign commercial banks conducting business in New York: Bank of America and Banco de la Nación Argentina ("BNA"). *Id.* at 5. Through those subpoenas, NML sought to "learn how Argentina moves its assets through New York and around the world" and to "identify the places and times when those assets might be subject to attachment and execution." *Ibid.* (internal quotation marks omitted).

NML's subpoena to Bank of America sought information about accounts maintained by or on behalf of Argentina, including account balances, closures, and transaction histories. Pet. App. 5-6. Because Argentina often holds assets in the name of entities affiliated with it, the subpoena defines "Argentina" to include Argentina's agencies, ministries, instrumentalities, political subdivisions, employees, and others acting on its behalf. *See id.* at 6.

The Bank of America subpoena also sought information about electronic fund transfers sent through the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") system. Pet. App. 6 & n.3. International transfers involving U.S. dollars are often routed through intermediary banks in New York, including Bank of America. *See id.* at 6 n.3. The subpoena directed Bank of America to produce documents relating to transactions conducted through its SWIFT portal that identified Argentina as the beneficiary, originator, or any other related party to a transaction. *See id.* at 6; *see also* J.A. 55. Those documents would enable NML to follow Ar-

gentina's flow of funds to locate its assets. *See, e.g.*, Pet. App. 6 & n.3.

NML's subpoena to BNA sought information about Argentina's accounts at BNA, other property obtained by BNA on Argentina's behalf, debts owed by BNA to Argentina, and flows of funds into and out of Argentina's accounts. Pet. App. 6. Like the Bank of America subpoena, the BNA subpoena defined "Argentina" to include entities controlled by, or acting on behalf of, Argentina. *See ibid.*

b. Argentina moved the district court to quash the Bank of America subpoena, and both banks objected to the subpoenas. Pet. App. 7. NML, in turn, moved to compel the banks to comply with the subpoenas. *Ibid.* Although it had "irrevocably agreed not to claim . . . such immunity," Argentina asserted that the subpoenas violated the very FSIA immunity from attachment and execution that it had "irrevocably waived." J.A. 106. Apart from its immunity arguments, Argentina did not contend that the subpoenaed information was privileged and did not argue that the subpoenas should be narrowed in any other respect. *See, e.g.*, Dkt. Entry 400, at 3.

Even before the district court ruled on the objections, NML agreed to narrow its subpoenas by excluding the names of some Argentine officials from Bank of America's initial SWIFT message search and to enter into a protective order with both banks affording confidential treatment to documents designated as confidential. C.A. J.A. 796-97, 930.

At a hearing on August 30, 2011, the district court denied Argentina's motion to quash and granted NML's motions to compel compliance with both subpoenas, with the understanding that NML would negotiate further with the banks to narrow the sub-

poenas. Pet. App. 45, 49-51. In so ruling, the district court emphasized that NML had been forced to seek the discovery at issue by Argentina's bad-faith "behavior." *Id.* at 45. The court confirmed its August 30 ruling in a written order on September 2, 2011. *See id.* at 21-22.

In accordance with the district court's ruling, NML proposed further limitations on its subpoenas. Bank of America negotiated with NML and soon began producing documents. *See* Pet. App. 8. BNA refused to negotiate or to comply with its subpoena, but the district court in December 2011 ordered it to comply with the modified subpoena. *See ibid.*[1]

c. Argentina appealed the district court's September 2 discovery order; the banks did not. Argentina maintained that the FSIA bars discovery concerning sovereign property except to the extent that the proponent of discovery identified specific property that it could show would potentially be subject to execution in the United States; the FSIA bars any discovery concerning assets outside the United States, according to Argentina, because those assets

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[1] BNA later produced documents that it maintained in New York and Miami, but refused to produce documents maintained outside the United States because disclosing them would purportedly violate local law. The district court determined that, "with the exception of [one country], complying with this court's orders would not violate the various countries' laws," and in any event that "in all countries . . . requiring compliance with this court's orders is appropriate since the balance of applicable factors weighs in favor of disclosure." Dkt. Entry 535, at 2-3, 7. Far from "proceed[ing] as though only private interests were implicated," U.S. Br. 15, the district court reached this conclusion based on a thorough analysis of the comity factors articulated by this Court, *see* Dkt. Entry 535, at 19-24.

are "categorically immune from attachment." Pet. C.A. Br. 45. Argentina did not challenge the subpoenas on grounds unrelated to immunity, nor did it urge that the subpoenas should be narrowed. The Second Circuit affirmed the discovery order, rejecting Argentina's argument that FSIA attachment immunity barred NML from obtaining post-judgment discovery in aid of execution from the banks. Pet. App. 9, 12-20.

The court of appeals recognized that "[a] district court has broad latitude to determine the scope of discovery and to manage the discovery process," "that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts," and that "[i]t is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets." Pet. App. 13-14 (citing Fed. R. Civ. P. 69(a)(2) and N.Y. C.P.L.R. § 5223). Consistent with these principles, the court of appeals held for two independent reasons that the district court did not abuse its discretion in ordering the banks to comply with NML's subpoenas.

First, the court explained, the discovery order "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all; it simply mandates [the banks'] compliance with subpoenas." Pet. App. 15. Although the district court lacked "the power to attach Argentinian property in foreign countries," *id.* at 15-16, the court of appeals emphasized that "the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question,"

id. at 16. Rather, the power to order such discovery derives "from [the district court's] power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." *Ibid.* In this case, "Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," *id.* at 18, and thus NML could obtain discovery about Argentina's assets, *see id.* at 16-17.

Second, the court of appeals held that the discovery order did not infringe Argentina's attachment immunity because "the subpoenas . . . were directed at [Bank of America] and BNA—commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege." Pet. App. 19. Moreover, because "[t]he FSIA says nothing about privilege," the court held that Congress "intended for courts to handle claims of privilege using the existing procedures under the Federal Rules." *Ibid.* (citing H.R. Rep. No. 94-1487, at 23). Yet Argentina had failed to invoke normal discovery rules to protect any privileged or confidential information. *See id.* at 20.

The court of appeals recognized that, "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others, to the extent that immunity has not been waived." Pet. App. 20. Discovery from the banks, however, "does nothing to endanger Argentina's sovereign immunity." *Ibid.*

SUMMARY OF ARGUMENT

The FSIA does not limit the broad post-judgment discovery routinely available under the Federal Rules of Civil Procedure. Because the subpoenas here accord with the Federal Rules of Civil Proce-

dure and fall within the district court's broad latitude to manage discovery, the Second Circuit correctly upheld them.

I. The Second Circuit's conclusion is compelled by the Federal Rules of Civil Procedure, the text and structure of the FSIA, and the policy choices that the FSIA embodies.

A. Federal Rule of Civil Procedure 69 and New York state law (applicable through Rule 69) authorize broad discovery in aid of execution. *See* Fed. R. Civ. P. 69(a)(2); N.Y. C.P.L.R. § 5223. In keeping with that broad authority, the district court correctly allowed NML to obtain discovery regarding Argentina's assets to locate property that could potentially be used to satisfy its judgments. Tailored to uncover information about property that may be subject to attachment—and permitted against the backdrop of Argentina's bad-faith "behavior," Pet. App. 45—the order falls well within the district court's broad authority to control discovery.

B. Argentina does not dispute that the Federal Rules would authorize the discovery sought here, but claims that the FSIA supersedes a district court's ordinarily broad discretion over post-judgment discovery. That is incorrect.

1. The FSIA's text and structure demonstrate that it does not limit the broad post-judgment discovery routinely afforded to judgment creditors under the Federal Rules of Civil Procedure. This Court does not adopt a statutory construction with "no basis or referent in [the statute's] language," *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011), and the FSIA contains no language limiting post-judgment discovery. "[T]he entire statutory text" confirms that the construction of the FSIA proposed

by Argentina and the government "is not the meaning that Congress enacted." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2286 (2010).

2. The acknowledged purposes of the FSIA confirm this conclusion. *First*, Congress sought in the FSIA to bring clarity and certainty to immunity determinations. Reading an atextual limitation on post-judgment discovery into the FSIA would undermine that effort. *Second*, the FSIA is Congress's attempt to balance the interests of judgment creditors with the interests of foreign states. If the Court imposed limitations in FSIA proceedings that have no basis in the FSIA's text, it would upset the balance that Congress struck.

3. Unable to muster any convincing arguments based on the FSIA's text, structure, or purpose, Argentina and the government advance policy-based arguments. They contend that the FSIA should be interpreted to limit discovery because pre-FSIA practice purportedly contained such a limitation. But the FSIA was expressly designed to displace the common-law approach to foreign sovereign immunity in favor of a more restrictive regime. Similarly, although Argentina and the government claim that permitting post-judgment discovery would undermine immunity's role as a protection against the burdens of litigation, they ignore that this protection applies only to immunity from suit; once a foreign state's immunity from suit has been overcome, as it has here because of Argentina's waiver of immunity, it is no longer entitled to avoid the burdens of litigation.

Argentina insists that the discovery at issue here would improperly give extraterritorial effect to the FSIA because it seeks information regarding proper-

ty both inside and outside the United States. But property outside the United States is not covered by the FSIA, which extends attachment immunity *only* to certain property in the United States. In any event, even if U.S. courts could not attach or execute against foreign property, the FSIA does not prohibit discovery of a judgment debtor's assets—wherever located—where (as here) the debtor is subject to the court's jurisdiction. The question whether particular property may be attached will be governed by the laws of the country where it is located, but the question whether NML may obtain discovery into the identity and location of Argentina's property is governed by the ordinary rules of discovery in federal court.

II. Even if this Court were to conclude that the FSIA imposes some limitations on post-judgment discovery, it should still uphold the district court's discovery order.

A. The FSIA does not limit post-judgment discovery against *non*-sovereigns, like that ordered here. Sovereign immunity is designed to protect foreign states. This immunity is not implicated where, as here, the discovery is directed to third parties, and thus the foreign state does not bear the responsibility of responding to the discovery at issue.

B. NML would be entitled to the discovery in any event because Argentina "irrevocably waived" and "agreed not to claim" "any immunity . . . f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy." J.A. 106. Indeed, Argentina "consent[ed]" "to . . . the issue of any process in connection with" a judgment. *Ibid.* That language un-

ambiguously encompasses the post-judgment discovery ordered here.

ARGUMENT

This Court should affirm the judgment below on any of three independent grounds: that the district court's order accords with the normal rules of post-judgment discovery and the FSIA does not abrogate those rules; that the FSIA does not limit post-judgment discovery against non-sovereigns, such as the discovery ordered here; and that Argentina waived any immunity that it might otherwise have possessed from the discovery at issue here.

I. THE DISCOVERY ORDER SHOULD BE AFFIRMED BECAUSE IT ACCORDS WITH THE NORMAL RULES GOVERNING POST-JUDGMENT DISCOVERY AND THE FSIA DOES NOT DISPLACE THOSE RULES.

The Federal Rules of Civil Procedure authorize broad post-judgment discovery in aid of execution. In accordance with federal law, the district court directed the banks to comply with subpoenas designed to identify assets on which NML may be able to execute its valid judgments against Argentina. In keeping with the district court's broad latitude over discovery, the court of appeals held that the district court did not abuse its discretion in compelling compliance with NML's subpoenas.

The FSIA provides no basis for upsetting the court of appeals' judgment. The text and structure of the FSIA demonstrate that the statute does not limit the broad post-judgment discovery routinely afforded to judgment creditors under the Federal Rules of Civil Procedure. In addition, upholding the discovery order serves the purposes of foreign sovereign im-

munity and respects the balance—between the interests of judgment creditors and of foreign states—that Congress struck in the FSIA. The judgment of the court of appeals should be affirmed.

A. The Discovery Order Accords With The Normal Rules Of Post-Judgment Discovery.

Federal law "allows judgment creditors to conduct full post-judgment discovery to aid in executing judgment." *Credit Lyonnais, S.A.* v. *SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998). Under Federal Rule of Civil Procedure 69(a)(2), "[a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor"—"[i]n aid of . . . execution," under the same rules that govern pre-trial discovery, and under "the procedure of the state where the court is located." *See, e.g.*, *Natural Gas Pipeline Co.* v. *Energy Gathering, Inc.*, 2 F.3d 1397, 1405 (5th Cir. 1993). Under Rule 26(b)(1), in turn, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

"A judgment creditor is [thus] entitled to discover the identity and location of any of the judgment debtor's assets, wherever located." *Nat'l Serv. Indus., Inc.* v. *Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982). New York law similarly entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," including all information calculated to lead to assets that might be subject to execution. N.Y. C.P.L.R. § 5223.

Consistent with the broad post-judgment discovery authorized by the Federal Rules, the district court upheld the subpoenas here. *See* Pet. App. 21-22, 49-51. NML is entitled to "all matter relevant to

the satisfaction of [its] judgment[s]." N.Y. C.P.L.R. § 5223. And the district court's order correctly permits NML to "obtain discovery" concerning Argentina's assets, "wherever located." *Nat'l Serv. Indus.*, 694 F.2d at 250.

Given that "the presumption should be in favor of full discovery of any matters arguably related to [NML's] efforts to trace [Argentina's] assets and otherwise to enforce its judgment[s]," *Credit Lyonnais*, 160 F.3d at 431, the district court acted well within its discretion, *see Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (noting a district court's "extensive control over the discovery process" (internal quotation marks omitted)). Indeed, mindful of the sensitive interests at stake, the district court acted "circumspectly" (*EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007) (internal quotation marks omitted)) in upholding the subpoenas. The district court required NML to narrow their scope to focus on discovery reasonably calculated to identify attachable property, Pet. App. 45, 49-51; NML agreed to enter into a protective order to safeguard confidential information, C.A. J.A. 797; and the district court emphasized that Argentina's "behavior" had forced NML to resort to such discovery, Pet. App. 45. The court of appeals thus correctly affirmed the district court's discovery order. *See id.* at 12-19.

B. The FSIA Does Not Limit Post-Judgment Discovery.

Argentina does not dispute that the district court's order complies with the Federal Rules concerning post-judgment discovery. Argentina's contention that the district court's order is unlawful rests entirely on its assertion that the FSIA categori-

cally prohibits post-judgment discovery unless that discovery is limited to "verify[ing] allegations of specific facts" that are "crucial" to determining whether specific property is immune from attachment and execution. Pet. Br. 22. But the FSIA does not displace Rule 69's regulation of post-judgment discovery. Indeed, far from curtailing such discovery, "Congress kept in place" the "normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011). This conclusion follows from the statutory text and structure and is confirmed by the policy choices that Congress embodied in the statute.

1. The Statutory Text And Structure Demonstrate That The FSIA Does Not Limit Post-Judgment Discovery.

This Court does not adopt a statutory construction with "no basis or referent in [the statute's] language." *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610. But neither section says anything about discovery—and nothing in the FSIA's text purports to limit post-judgment discovery in aid of execution. Indeed, Argentina and the government concede that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15.

Sources of law other than the FSIA may limit post-judgment discovery against foreign states, including both settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may ap-

propriately consider comity interests and the burden that the discovery might cause to the foreign state. *See Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543-44 & n.28 (1987). Argentina has not asserted these grounds for limiting the subpoenas. Instead, Argentina argues only that the FSIA prohibits disclosure of the subpoenaed information, and indeed any post-judgment discovery seeking to identify a sovereign's assets.

Because the text of the FSIA provides "no basis" for limiting post-judgment discovery in FSIA proceedings, *Milner*, 131 S. Ct. at 1267, however, this Court must conclude that the FSIA "does not attempt to deal with questions of discovery," H.R. Rep. No. 94-1487, at 23 (1976), and that Congress instead "kept in place" the "normal discovery apparatus in FSIA proceedings," *FG Hemisphere*, 637 F.3d at 378. That is sufficient to affirm the judgment below: Under the "normal" rules of discovery, the district court's order must be upheld. *See supra* Part I.A.

a. "[T]he entire statutory text" confirms that construing the FSIA to limit post-judgment discovery "is not the meaning that Congress enacted." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2286 (2010). Rather, "the FSIA as a whole" (*id.* at 2289) demonstrates that, if Congress had wanted to limit post-judgment discovery, it would have done so expressly in the FSIA's text.

First, when Congress wanted to grant a particular immunity in the FSIA, it "careful[ly] calibrat[ed]" the scope of that immunity. *Samantar*, 130 S. Ct. at 2288. When granting jurisdictional immunity from suit and post-judgment immunity from attachment and execution, *see* 28 U.S.C. §§ 1604, 1609, Congress

specified in detail when those immunities would not be available, *see id.* §§ 1605-1607, 1610-1611. Through these detailed exceptions to immunity—which "are central to the Act's functioning," *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004)—Congress sought to "bring order to th[e] legal uncertainty" that shrouded immunity determinations before the FSIA was enacted, *id.* at 716 (Kennedy, J., dissenting).

Yet the FSIA provides no *hint* about the scope of, or limitations on, any immunity from post-judgment discovery. If Congress had wanted to provide such an immunity, it would have done so in the FSIA's text: A Congress that is intent on providing certainty in an area of disarray, that carefully defines the scope of particular immunities, and that just as carefully delineates the exceptions to those immunities, would not abruptly decline to provide *any* textual guidance about the scope of other immunities that it supposedly wished to grant.

To conclude otherwise would invite the very "legal uncertainty" that the FSIA sought to overcome. *Altmann*, 541 U.S. at 716 (Kennedy, J., dissenting). Indeed, it would "hardly furthe[r] Congress' purpose of 'clarifying the rules that judges should apply in resolving sovereign immunity claims'" to "lump . . . in" an immunity from post-judgment discovery "without so much as a word spelling out how and when" such an immunity would apply. *Samantar*, 130 S. Ct. at 2291 (quoting *Altmann*, 541 U.S. at 699). The structure of the FSIA thus demonstrates that Congress did not enact—and did not want to enact—any immunity from post-judgment discovery.

Second, the structure of the FSIA shows that Congress left in place the broad post-judgment dis-

covery available under the Federal Rules of Civil Procedure—just as it left in place most procedures set forth in the Federal Rules. When Congress wanted to override normal rules of procedure in FSIA proceedings, it did so expressly in the FSIA's text. Section 1608 of the FSIA, for example, contains detailed provisions on service that plainly displace the normal rules set forth in Federal Rule of Civil Procedure 4. *See* 28 U.S.C. § 1608; *see also* H.R. Rep. No. 94-1487, at 23. Similarly, Section 1605(g)—added to the statute in 1996—directs courts to "stay any request, demand, or order for discovery on the United States" in certain cases involving terrorism. 28 U.S.C. § 1605(g)(1)(A). And the statute expressly suspends the normal operation of Federal Rules of Civil Procedure 12 and 56 when such a stay has been entered. *See id.* § 1605(g)(4).

In the absence of language limiting the Federal Rules on post-judgment discovery, "drawing meaning from silence," as Argentina and the government invite this Court to do, is improper. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). Indeed, it is "particularly inappropriate" here because "Congress has shown that it knows how to [address discovery] in express terms." *Ibid.*; *see also, e.g.*, *Samantar*, 130 S. Ct. at 2288 (same); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003) (same). This conclusion accords with the settled rule that federal law should not be read to displace the Federal Rules of Civil Procedure unless the law contains a "plain statement of a pre-emptive intent," *Société Nationale*, 482 U.S. at 539, which neither Argentina nor the government claims is present here. *See Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979) (rejecting argument that federal statute precluded application of Rule 23 be-

cause the statute lacked "the necessary clear expression of congressional intent" to override Rule 23).

Third, the FSIA as a whole confirms that Congress was acutely aware of foreign-relations and comity concerns, but did not believe any special statutory rule was necessary to deal with those concerns in the context of post-judgment discovery. To the contrary, when Congress believed that such concerns required a statutory rule, it addressed that issue in the FSIA's text. The FSIA provides, for example, broad federal jurisdiction over cases involving foreign states "without regard to amount in controversy." 28 U.S.C. § 1330(a). Congress bestowed this broad jurisdiction on federal courts to promote "uniformity in decision," which it deemed "desirable" because "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13; *see also Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 497 (1983) (similar). For similar reasons, Congress provided foreign states a correspondingly broad right to remove cases to federal courts. *See* 28 U.S.C. § 1441(d); *see also* H.R. Rep. No. 94-1487, at 32 (noting "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

The FSIA is replete with provisions accommodating foreign-relations concerns. Congress precluded pre-suit attachments (*see* 28 U.S.C. § 1609) because such attachments "can . . . give rise to serious friction in [the] United States' foreign relations," and thus "[t]he elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States." H.R. Rep. No. 94-1487, at 27. Moreover, although Congress provid-

ed exceptions to foreign states' attachment immunity, it immunized from attachment certain property used or intended to be used for military activity (28 U.S.C. § 1611(b)(2)) to help "avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments," H.R. Rep. No. 94-1487, at 31.

These provisions confirm that Congress was attuned to the foreign-relations concerns raised by the restrictive theory of sovereign immunity. At each turn, it addressed *in the text of the FSIA* those concerns that it deemed to require a special statutory rule. But neither the text nor structure of the statute suggests Congress believed that post-judgment discovery presented sufficiently weighty foreign-relations concerns to justify an exception to existing law. *Cf.* H.R. Rep. No. 94-1487, at 23 (deeming "adequate" "[e]xisting law" governing "discovery").

By embracing the restrictive theory and allowing private litigants to overcome claims of immunity in a variety of circumstances, Congress *accepted* some friction in foreign relations and some affronts to comity. Although "the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject in international law" in 1976, Congress nonetheless "partially lower[ed] the barrier of immunity from execution" in Section 1610. H.R. Rep. No. 94-1487, at 27. And although it doubtless understood that some sovereigns could be "insult[ed]" if their "military property" did not enjoy blanket immunity, Pet. Br. 43; *see also* U.S. Br. 27, Congress did not provide absolute enforcement immunity even for military property. Although Argentina insists that Section 1611(b)(2) provides such

categorical immunity, *see* Pet. Br. 7, 25-26, 28, that provision immunizes only property that "is, or is intended to be, *used* in connection with a military activity, *and* (A) is of a military character, or (B) is under the control of a military authority or defense agency." 28 U.S.C. § 1611(b)(2) (emphases added).

The FSIA's structure demonstrates that Congress fully considered comity and foreign-relations risks, allaying some risks and accepting others. It would be unwarranted to impose atextual limits in FSIA proceedings—such as Argentina's proposed limitations on post-judgment discovery—in the name of concerns that Congress already addressed.

b. Because the statutory text and structure do not limit post-judgment discovery, the court of appeals correctly affirmed the district court's order allowing post-judgment discovery regarding Argentina's assets. Section 1609 of the FSIA does not provide a general "entitlement to immunity *in connection with* litigation to enforce a judgment." U.S. Br. 18, 30 (emphasis added). Immunity from litigation is accorded by Section 1604; once it is overcome, as here by Argentina's waiver, the FSIA provides only a limited immunity from "attachment arrest and execution" to "the property in the United States of a foreign state." 28 U.S.C. § 1609. Asset discovery is not attachment or execution; it is only discovery—and thus is permitted under the FSIA subject to recognized privileges and the district court's broad discretion to establish appropriate limitations based on the circumstances before it.

The court of appeals' decision below accords with the weight of judicial authority holding that "permit[ting] full discovery" against a sovereign judgment debtor "would not intrude upon [the foreign

state's] sovereign immunity." *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*"). As the Second Circuit held more than a decade ago, "where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," including discovery designed to identify the judgment debtor's assets. *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48, 53-54 (2d Cir. 2002) ("*Rafidain II*"). Such "[d]iscovery of a judgment debtor's assets," the court emphasized, "is conducted routinely under the Federal Rules of Civil Procedure." *Ibid.*

Courts reaching this conclusion have acknowledged—as the court of appeals did in this case, *see* Pet. App. 15-16—that such discovery might uncover property on which a United States court lacks authority to execute. *See, e.g., Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992). But they have recognized that a district court may order discovery into the identity and location of a foreign state's assets to allow the judgment creditor "to determine which courts" would have jurisdiction over those assets. *Id.* at 1478. Courts have therefore upheld post-judgment discovery in a variety of circumstances—requiring even "discovery [regarding a foreign state's] assets worldwide," so that the judgment creditor can "identif[y] . . . current assets in order to execute [its] judgment." *Id.* at 1471, 1475.

Argentina and the government maintain (Pet. Br. 22, 29; U.S. Br. 17) that the Fifth and Ninth Circuits have held that discovery concerning a foreign state's assets should be ordered "circumspectly and

only to verify allegations of specific facts crucial to an immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). But that "circumspect[ion]"—repeatedly endorsed by the Second Circuit, *e.g.*, *EM Ltd.*, 473 F.3d at 486—is not "based on an interpretation of FSIA preemption." *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process." *Flatow*, 308 F.3d at 1074 (internal quotation marks omitted); *see also* Pet. App. 13.

Thus, a district court can "weig[h] the benefits of additional discovery against the intrusiveness to [the foreign state] of permitting such discovery," *Rafidain I*, 150 F.3d at 175, and can deny "discovery requests [that] ha[ve] 'gone too far,'" *Af-Cap*, 475 F.3d at 1096. Consistent with this guidance, the district court narrowed the subpoenas; indeed, it did so even though Argentina did not argue that the subpoenas should be narrowed on privilege or discretionary grounds, and instead raised only wholesale assertions of immunity that it had waived and agreed never to claim.

The Seventh Circuit alone has interpreted the FSIA to impose a categorical limitation on post-judgment discovery from a foreign state. As Argentina and the government have argued here, *see* Pet. Br. 22, 29; U.S. Br. 9-10, the Seventh Circuit held in *Rubin* v. *Islamic Republic of Iran* that the FSIA permits discovery in aid of execution only with respect to "*specific property*" that the judgment creditor has *already* "identified" as potentially "subject" to attachment. 637 F.3d 783, 799 (7th Cir. 2011) (emphasis added). Beyond having no basis in the FSIA's

text or structure, that approach is completely unworkable. If the judgment creditor were aware of a potentially attachable asset held by the foreign state, it would not "nee[d] discovery" to identify the asset *in the first place*. *Richmark*, 959 F.2d at 1478. But where, as here, the judgment debtor has repeatedly attempted to "conceal its assets from the district court and therefore avoid execution of [the] judgment," *ibid.*, a judgment creditor needs discovery simply to learn what assets exist and where.

2. Applying Normal Rules Of Post-Judgment Discovery In FSIA Proceedings Accords With The Policy Decisions Embodied In The FSIA.

Applying the normal rules of post-judgment discovery in FSIA proceedings promotes the purposes of the FSIA and respects the balance struck by Congress. In contrast, engrafting onto the FSIA an atextual immunity from post-judgment discovery would disserve those purposes and undermine Congress's careful efforts to construct a balanced and tailored immunity doctrine.

a. Adopting an atextual immunity from post-judgment discovery would defeat one of the FSIA's "principal purposes": "clarifying the rules that judges should apply in resolving sovereign immunity claims." *Altmann*, 541 U.S. at 699. Before the FSIA was enacted, immunity determinations were in "some disarray" (*id.* at 690) because the standards governing such determinations "were neither clear nor uniformly applied," and did not consistently adhere to the restrictive theory of sovereign immunity. *Verlinden*, 461 U.S. at 488. The FSIA was Congress's attempt "to remedy these problems." *Alt-*

mann, 541 U.S. at 691. In the FSIA, Congress "established a *comprehensive* framework for resolving *any* claim of sovereign immunity"—precisely "to accomplish" its goal of "clarifying the rules" governing all immunity claims. *Id.* at 699 (emphases added).

Argentina and the government would have this Court treat the FSIA not as "a comprehensive set of legal standards," *Verlinden*, 461 U.S. at 488, but instead as a jumping-off point from which courts can create, in common-law fashion, atextual immunities based solely on the statute's "basic principles." Pet. Br. 39 n.18. Such an approach would defeat Congress's effort to "clarif[y] the rules" governing immunity claims. *Altmann*, 541 U.S. at 699. "Quite obviously, Congress' purposes in enacting such a comprehensive" statute "would be frustrated if . . . courts were to continue to follow" the sort of "ambiguous" "standards" that "the FSIA replaced." *Ibid.* (internal quotation marks omitted); *see also* H.R. Rep. No. 94-1487, at 9.[2]

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[2] In pressing what it believes to be the FSIA's purposes, Argentina invokes (*see* Pet. Br. 23, 39-40 & n.18) Section 1602 of the FSIA, which provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Argentina maintains that Section 1602 "instruct[s] courts to apply the basic principles of the FSIA to issues of both procedure and substance that the Act does not explicitly address." Pet. Br. 39 n.18. But Section 1602 states that courts should apply the principles "*set forth* in this chapter" (emphasis added)—not unenacted, atextual principles akin to those the statute was enacted to replace. Accordingly, in cases invoking Section 1602, this Court has carefully examined the text of the FSIA itself. *See Samantar*, 130 S. Ct. at 2285-89; *Altmann*, 541 U.S. at 691, 697-98.

Moreover, reading discovery limits into the FSIA would upset the careful balance that Congress struck in the statute. Congress embraced a *restrictive* theory of sovereign immunity that held sovereigns entering the United States to engage in commercial activity (such as selling bonds) to the same standards of liability as private parties. The United States has long been a "major source of private international credit," *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985), and thus "the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders." *Pravin Banker Assocs., Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

The FSIA represents Congress's attempt to balance this interest with the interests of foreign states. Congress's decision to provide certain immunities to foreign sovereigns, but not to immunize them from discovery following entry of judgment against them, draws the balance in favor of creditors obtaining the information necessary to enforce their judgments, and thus (among other things) promotes viable primary and secondary markets in sovereign debt. Argentina would impermissibly redraw this balance, preventing creditors from obtaining the information they need to locate even non-immune assets, and thereby making enforcement against a recalcitrant sovereign nearly impossible. *See* Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina* 9 (Wash. Legal Found., Working Paper No.

140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf.[3]

b. Against these policies embodied in the FSIA, Argentina and the government contend that the FSIA should be read to limit post-judgment discovery because failure to do so would supposedly undermine foreign relations, international comity, and reciprocity. *See* Pet. Br. 39-50; U.S. Br. 18-22, 32-33.

As explained above, however, the FSIA's text and structure demonstrate that Congress *already* balanced these interests with the interests of judgment creditors, and promoted foreign-relations interests—to the extent it wished—in the FSIA's text. This Court "need not determine whether declining to afford" a newly claimed immunity would "undermin[e]" "foreign relations" and "reciprocal protection" where, as here, "the [FSIA] does not address" the immunity. *Samantar*, 130 S. Ct. at 2290 n.14. Argentina maintains that "numerous treaties, conventions, and

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[3] Argentina attempts to undermine NML's judgments by denigrating NML as a "'vulture' hedge fun[d]," Pet. Br. 10—a term that Argentina apparently would apply to any secondary-market purchaser of its debt. But Argentina is a G-20 nation that, as the district court found, has ample resources to pay its debts. *See NML Capital, Ltd.* v. *Republic of Argentina*, 08 Civ. 6978, 2012 WL 5895784, at *1 (S.D.N.Y. Nov. 21, 2012). In any event, secondary purchasers of sovereign debt facilitate the primary market for that debt by allowing primary creditors to reduce their exposure to questionable debts. *See* Fernando Broner *et al.*, *Sovereign Risk and Secondary Markets*, 100 Am. Econ. Rev. 1523, 1523 (2010). For this reason, the "long term effect" of "rendering otherwise valid debts unenforceable" would be "significant harm" to "developing nations and their institutions seeking to borrow capital" in the United States. *Elliott Assocs., L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999).

common law immunities" illustrate the "insult to comity" supposedly posed by post-judgment discovery against foreign sovereigns, Pet. Br. 43, but none of those authorities contains the "plain statement of a pre-emptive intent" that this Court has deemed necessary to displace the Federal Rules of Civil Procedure, *Société Nationale*, 482 U.S. at 539.

Even when recognizing the need to "demonstrate due respect for . . . any sovereign interest expressed by a foreign state," *Société Nationale*, 482 U.S. at 546, *quoted at* Pet. Br. 42; U.S. Br. 19, this Court has *rejected* the arguments made by Argentina and the government here: that the Federal Rules governing discovery do not apply fully when such an interest is present, *see* 482 U.S. at 539-40, and that the Court should "articulate specific rules"—found nowhere in the Federal Rules—to limit discovery in light of comity, *id.* at 546. Instead, the Court has held that district courts should address concerns of comity as part of their overall discretionary task of "supervis[ing] . . . discovery." *Ibid.* Though Argentina demeans such an approach as "impos[ing] no bounds at all," Pet. Br. 47-48, this Court's precedent forecloses its complaint.

Moreover, Argentina and the government *still* do not marshal even one concrete example of foreign-relations harm in the decade-plus since the Second Circuit cemented its position in *Rafidain II* that the FSIA does not limit post-judgment discovery in aid of execution. *See* NML Supp. Br. 11; *cf.*, *e.g.*, U.S. Br. 21-22 (speculating, without citation, that "[a]llowing sweeping discovery into foreign sovereigns' assets" "may result over the long term in reduced cooperation in a variety of areas"). It is not hard to see why: Such discovery is necessarily rare because it is au-

thorized only where, as here, a U.S. court has jurisdiction over a sovereign and enters a judgment against the sovereign that it refuses to pay.[4]

Argentina and the government observe (Pet. Br. 48-50; U.S. Br. 20-21, 32-33) that "some foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). Yet they are wrong to insist that discovery like that ordered here "could lead to reciprocal adverse treatment of the United States in foreign courts." U.S. Br. 20. To the extent that reciprocity matters at all here, *but see supra* at 36, the proper question is how the discovery ordered in this case might affect how the United States will be treated in foreign courts *in like circumstances*. In *Persinger*, for example, the D.C. Circuit considered whether the FSIA allows suit against foreign states for tortious injuries that occurred on the premises of a United States embassy. In considering reciprocity interests, the court noted that allowing such suits under the FSIA could "subject the United States to suits abroad *for torts committed on the premises of embassies located here*." 729 F.2d at 841 (emphasis added).

The proper reciprocity question in this case is not, as Argentina would have it, whether a "Chinese

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[4] Argentina maintains that the comity interests are even stronger here than in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014). *See* Pet. Br. 41-42; *see also* U.S. Br. 19. But this case involves nothing akin to the "exorbitant," "uninhibited approach to . . . jurisdiction" rejected in *Daimler*. 134 S. Ct. at 751, 761, 763. Argentina "irrevocably waived" its immunity from suit, J.A. 106, and it "does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," Pet. App. 18.

court" could (apparently out of nowhere) "orde[r] the U.S. embassy in China or Bank of America Asia Pacific to produce information on the United States Government's worldwide assets, including military property." Pet. Br. 49-50. Rather, the correct question is whether it would be inappropriate for a foreign court to allow post-judgment discovery against the United States where: (1) the United States broadly waived its sovereign immunity (as Argentina did here); (2) the United States then flagrantly breached an indisputably valid legal obligation as to which it had waived sovereign immunity (as Argentina did here); (3) indisputably valid judgments were entered against the United States (as against Argentina here); *and* (4) the United States refused, in bad faith and in repeated defiance of the foreign court and its creditor, to satisfy those judgments (as Argentina has done here). Neither Argentina nor the government explains why discovery from the United States would be inappropriate under such circumstances.

c. Even if the Court believed that allowing post-judgment discovery might undermine some goals animating the FSIA, it still should not recognize an atextual immunity from post-judgment discovery. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992). Thus, this Court follows the result dictated by the statutory language *even when* doing so might defeat some of the FSIA's ostensible goals.

In *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), for example, this Court held that 28 U.S.C. § 1447(d) bars federal courts of appeals from reviewing district court decisions remand-

ing cases to state court that purported foreign sovereigns had removed under the FSIA. *Id.* at 238-39. Although the Court was "well aware" of the "undesirable consequences in the FSIA context" of "immuniz[ing]" erroneous remands from appellate review, the Court allowed those consequences because the statutory language left no other choice. *Id.* at 237. Arguments regarding such consequences, the Court emphasized, implicate "a policy debate that belongs in the halls of Congress, not in the hearing room of this Court." *Ibid.*

The same reasoning applies to the consequences that Argentina and the government hypothesize in this case. In the face of statutory text that provides no support for limiting post-judgment discovery, it is not for this Court to "rende[r] a quintessential policy judgment" divorced from that text, *Powerex*, 551 U.S. at 238 n.5; rather, "what the text of [the statute] indisputably does"—or, in this case, does not do—must "prevai[l]," *id.* at 238.

3. The Policy Arguments Advanced By Argentina And The Government Do Not Justify Their Proposed Limitations On Post-Judgment Discovery.

Because nothing in the FSIA's text, structure, or acknowledged purposes limits post-judgment discovery, Argentina and the United States are forced to rely on a variety of arguments unmoored from these interpretive sources. None has merit.

a. Relying on the broad attachment immunity that foreign states enjoyed before the FSIA was enacted, Argentina and the government maintain that, if Congress had wanted the Federal Rules on post-judgment discovery to apply in FSIA proceedings, it

was required to state that intention clearly in the FSIA. *See* Pet. Br. 32-36; U.S. Br. 22-24. But this Court has held that federal law must contain a "plain statement of a pre-emptive intent" to displace the Federal Rules. *Société Nationale*, 482 U.S. at 539; *see also Califano*, 442 U.S. at 700 (applying same rule to reject argument that federal statute precluded application of Federal Rules). Although Argentina and the government rely on *Société Nationale*, *see* Pet. Br. 42; U.S. Br. 19, 24 n.11, 26, 33, they never acknowledge that holding.

Argentina and the government maintain that reading the FSIA to permit normal post-judgment discovery would conflict with the presumption against abolishing common-law principles. Pet. Br. 33-36; U.S. Br. 22-24; *see also id.* at 12-14. But this argument ignores that the FSIA was adopted precisely *because of* the problems with pre-FSIA practice: it was inconsistent and unpredictable, and sometimes failed to follow the restrictive theory of sovereign immunity. "After the enactment of the FSIA," this Court has explained, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar*, 130 S. Ct. at 2285.[5]

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[5] Argentina and the government also overstate the supposed uniformity of pre-FSIA cases regarding the post-judgment authority of U.S. courts. *Compare*, *e.g.*, Pet. Br. 33 (asserting that, before the FSIA, "there were n[o]" "post-judgment remedies to plaintiffs in aid of enforcing judgments against a foreign sovereign"), *and* U.S. Br. 13 (maintaining that "the established" pre-FSIA "sovereign immunity regime . . . gave a judgment debtor [*sic*] no ability *at all* to execute against a sovereign's property"), *with Flota Maritima Browning de Cuba, Sociadad*

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Observing that this Court has required Congress to "unequivocally expres[s]" its intent to abrogate federal sovereign immunity, Argentina also suggests that this Court should demand a similar plain statement in the FSIA. Pet. Br. 34 (internal quotation marks omitted). But federal sovereign immunity begins from a strong presumption that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Foreign sovereign immunity begins from the *opposite* presumption: that foreign states are *not* immune from the jurisdiction of United States courts because "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Requiring a plain statement from Congress before denying immunity makes no sense for foreign sovereign immunity because the decisive question is whether and to what extent Congress has *granted* immunity to foreign sovereigns.[6]

[Footnote continued from previous page]
Anonima v. *Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 626-27 (4th Cir. 1964) (holding that foreign state had waived immunity from execution).

[6] Argentina contends that this Court has construed 42 U.S.C. § 1983 not to "covert[ly]" "eliminat[e]" well established immunities through its general language. Pet. Br. 35 (internal quotation marks omitted). But there is nothing "covert" about the FSIA, which provides "a comprehensive set of legal standards governing claims of immunity" (*Verlinden*, 461 U.S. at 488) and specifies, in its text, the precise scope of the immunities it protects. Moreover, Congress adopted the FSIA to dispense with the type of historical inquiry that underlies immunity determinations under Section 1983. *See Altmann*, 541 U.S. at 700 (faulting court of appeals for "engag[ing] in precisely the kind of

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b. Argentina and the government contend that allowing the discovery here would undermine a core function of immunity: to "protec[t] against the costs, in time and expense, and other disruptions attendant to litigation." U.S. Br. 15 (internal quotation marks omitted); *see id.* at 15-17, 32-33; Pet. Br. 29-32, 44-46. Relying on cases involving jurisdictional immunity from suit under the FSIA and the qualified immunity of some government officials, they observe that courts have "confine[d] the scope of discovery" in those contexts "to encompass only facts that are necessary to verify an alleged exception to immunity." U.S. Br. 16; *see also* Pet. Br. 29-30. According to Argentina and the government, the reasoning for limiting discovery in those contexts also applies to post-judgment discovery in aid of execution. *See* U.S. Br. 15-17; Pet. Br. 29-32.

Limiting discovery in the context of immunity *from suit* under the FSIA is based on the "nature of FSIA immunity, which is immunity not only from liability, but from the burdens of litigation as well." *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000). The same theory animates discovery limitations in cases involving qualified immunity: Qualified immunity provides "a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (emphasis and internal quotation marks omitted).

Argentina relinquished that right by broadly waiving its immunity *from suit*. Once the plaintiff

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detailed historical inquiry that the FSIA's clear guidelines were intended to obviate").

has overcome a foreign state's jurisdictional immunity from suit, the foreign state no longer has any statutory "protection from the inconvenience of suit." *Dole Food*, 538 U.S. at 479. To the contrary, the FSIA expressly provides that, in such cases, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

In any event, apart from its waiver of immunity from suit, Argentina *also* waived any immunity from post-judgment legal process. *See* J.A. 106; Pet. App. 4 & n.1. Thus, even if Argentina were correct that attachment immunity otherwise would imply certain limitations on post-judgment discovery, those limitations would not be available to Argentina here.

c. Argentina contends that the court of appeals gave improper extraterritorial effect to the FSIA by upholding subpoenas that could uncover information about property located outside of the United States. *See* Pet Br. 36-39. But allowing discovery from entities subject to judgments in U.S. courts does not constitute an extraterritorial application of the FSIA (or Rule 69).

A federal court with personal jurisdiction over a defendant "may command her to take action even outside the United States." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013). For that reason, under the Federal Rules, a court validly may compel disclosure of a judgment debtor's property outside the United States. *See*, *e.g.*, *Nat'l Serv. Indus.*, 694 F.2d at 250. And while NML's discovery "might *lead*" to attachment or execution elsewhere in the world, Pet. App. 31 (emphasis added)—although so far it has led only

to proceedings in the United States[7]—the district court did not conclude that *it* could order the attachment of property abroad. Instead, the district court recognized that, where property outside the United States is concerned, attachment and execution might be ordered not under the FSIA, but "on some other theory in a foreign country." *Id.* at 44. Thus, consistent with personal-jurisdiction principles and the presumption against extraterritoriality, the discovery order does no more than direct two banks operating in New York to produce documents bearing on the property of a judgment debtor in U.S. court.

d. Argentina and the government contend that the subpoenas conflict with the FSIA because, in addition to property in the United States, they also might uncover information about assets that are supposedly immune from attachment or execution: assets located outside of the United States; central bank and military property; diplomatic property; and property belonging to persons other than the judgment debtor. *See* Pet. Br. 43-44 & n.20; U.S. Br. 24-30. This argument is more properly directed to the discretion of the district court in assessing the scope of the subpoena. Argentina, however, chose not to urge that the subpoenas should be narrowed based on claims of privilege or the district court's discretion, but instead argued only that the subpoenas should be "quashed" in their entirety on immunity grounds. *E.g.*, Dkt. Entry 400, at 14. In any event, the argument is misguided.

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[7] *See* Complaint, *NML Capital, Ltd.* v. *Space Exploration Techs. Corp.*, No. CV14-02262-SVW(Ex) (C.D. Cal. filed Mar. 25, 2014) (suit under California law to execute on Argentina's contractual rights under commercial launch services contracts between Argentina and Space Exploration Technologies Corp.).

Argentina repeatedly asserts that the FSIA provides attachment immunity for property located outside of the United States. *See, e.g.*, Pet. Br. 6, 21, 25, 26, 28, 38, 45. That is, indeed, the central premise behind its claim that "*all* property of a foreign state is presumptively immune from the authority of the U.S. courts" unless (among other things) it is "located in . . . the United States." *Id.* at 1 (emphasis added). But this is false. Far from "clearly express[ing]" Congress's "affirmative intention" to extend attachment immunity to property abroad, *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted), Section 1609 provides immunity from attachment and execution only for certain "property *in the United States*." 28 U.S.C. § 1609 (emphasis added). Thus, unlike property in the United States, foreign-held property is not protected by *any* grant of immunity under the FSIA.[8]

As for the other assets that are purportedly immune from attachment: The subpoenas do not seek information solely about immune central bank, military, or diplomatic property; they seek information about all assets that Argentina possesses, so that NML can identify where Argentina may be holding

[8] The government insists that Section 1609 "confirms the fundamental proposition that it would be unthinkable for a U.S. court . . . to presume to order the attachment of or execution against property of a foreign sovereign abroad." U.S. Br. 25. The issue is not whether a U.S. court can *attach* or *execute* against foreign property, but instead whether a foreign state can be required to provide *discovery* regarding that property following entry of a judgment against it in U.S. court. Nothing in the FSIA suggests, let alone "confirms," that the post-judgment discovery routinely available under the Federal Rules is not available in FSIA cases.

property that *is* subject to execution. Although that includes property held in the name of central bank, military, and diplomatic entities, nothing in the FSIA (or in the other authorities cited by Argentina and its *amici*) provides immunity for all assets that those entities might possess, let alone all information regarding such assets. As explained above, for example, the FSIA immunizes from attachment only *certain* military property. *See supra* at 29-30. Although the subpoenas might produce information about assets that are not subject to attachment, Argentina asserted no privilege from disclosure specific to that property. In the absence of a demonstration of privilege, NML is entitled to the information necessary to identify attachable assets, unconstrained by *ex ante* limitations on the scope of discovery based on nothing more than Argentina's self-serving assertions about which of its assets are attachable. That is particularly true because Argentina has waived its immunity and yet has consistently structured its finances to hinder NML's attempts to enforce the judgments.

Similar reasons support NML's requests for information about the assets held by persons and entities other than Argentina. As an initial matter, Argentina failed to suggest below any principle for narrowing the subpoenas on this basis; having rested instead on its blanket immunity argument for quashing the subpoenas in full, it should not be permitted to complain now. Moreover, as the government acknowledges, NML may be able to execute against property held by other entities if it establishes that "separate juridicial entities should [not] 'be treated as such.'" U.S. Br. 29 (quoting *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983)). NML needs to understand Ar-

gentina's financial activity in order to know whether that presumption has been overcome—particularly because Argentina has evaded judgment enforcement by holding assets in the name of entities affiliated with it. The discovery is appropriately calculated to help NML learn that information.

e. Argentina also contends that the FSIA's legislative history supports reading the statute to limit post-judgment discovery. *See* Pet. Br. 50-53. Downplaying the statement that "[t]he bill does not attempt to deal with questions of discovery," H.R. Rep. No. 94-1487, at 23; *see* Pet. Br. 50-51, Argentina focuses (*see* Pet. Br. 52-53) on the House Report's statement that "[t]he term 'attachment in aid of execution'" in Section 1610(a) "is intended to include attachments, garnishments, and *supplemental proceedings* available under applicable Federal or State law to obtain satisfaction of a judgment," H.R. Rep. No. 94-1487, at 28 (emphasis added). Argentina maintains that "[o]ne such supplementary proceeding is discovery '[i]n aid of the judgment or execution'" under Rule 69, and thus that the attachment immunity provided in Section 1610 limits the discovery available under Rule 69. Pet. Br. 52; *see id.* at 52-53.

Argentina is wrong that the term "supplemental proceedings" in the House Report includes discovery under Rule 69. When the FSIA was enacted, Rule 69(a) read:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and

> procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Fed. R. Civ. P. 69(a) (1970). Rule 69(a) therefore provided, *first*, that—unless a federal statute said otherwise—the relevant *state* law would govern "supplementary" proceedings. *Second*, and by contrast, it provided that post-judgment discovery would be governed by the *federal* rules of civil procedure or the relevant state law. Reading "supplemental proceedings" to include post-judgment discovery (as Argentina advocates) would cause Rule 69 to give conflicting directives: When conducting post-judgment discovery, courts would be told both (1) to follow the applicable state law (unless a federal statute said otherwise), and (2) to follow the Federal Rules of Civil Procedure *or* the applicable state law.

Instead, the reference to "supplementary" (or "supplemental") proceedings—in both Rule 69 and the House Report—is best read to denote the traditional proceedings associated with "the protection and enforcement of federal judgments," that is, "attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996). Because Rule 69 mandates that state law governs these

remedies unless Congress says otherwise, the House Report made clear that the FSIA was changing the default rules. By contrast, "[e]xisting law" governing "discovery"—*i.e.*, the Federal Rules—was deemed to be "adequate." H.R. Rep. No. 94-1487, at 23; *see also Samantar*, 130 S. Ct. at 2294 (Scalia, J., concurring in the judgment) (noting "the bill's failure to deal with discovery" as "ma[de] . . . clear" in the House Report).

f. Argentina and the government suggest that Rule 69 itself provides that the FSIA limits post-judgment discovery because Rule 69(a)(1) "specifically states that 'a federal statute,' here the FSIA, 'governs' where applicable." Pet. Br. 39 (quoting Fed. R. Civ. P. 69(a)(1)); U.S. Br. 31 (same). Argentina and the government ignore that Rule 69(a)(1) does not address discovery; only Rule 69(a)(2) does so, and that provision does not contain the language on which they rely. In any event, their argument is mistaken.

Rule 69(a)(1) provides that "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." By Rule 69(a)(1)'s terms, a federal statute would "gover[n]" only when that federal statute provides a "procedure" on execution or in enforcing a judgment. But "[t]he FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010).

II. Even If The FSIA Limited Post-Judgment Discovery, The Discovery Order Should Still Be Upheld.

Even if this Court were to conclude that the FSIA limits post-judgment discovery, it should still uphold the district court's discovery order on either of two independent grounds. *First*, even if the FSIA limits post-judgment discovery from sovereigns, it does not block such discovery from *non*-sovereigns, such as the two banks subject to the subpoenas at issue here. *Second*, even if the FSIA could be read to block discovery from non-sovereigns, NML would still be entitled to discovery here because Argentina has waived *any* immunity from post-judgment discovery in aid of execution.

A. The FSIA Does Not Block Discovery From Non-Sovereigns.

The district court compelled discovery from two third-party, non-sovereign commercial banks. *See* Pet. App. 9. Because it did not order discovery from a foreign state, there is no basis for concluding that the FSIA limits that discovery.[9]

Whatever grounds may support protecting foreign states from discovery in aid of execution, those grounds—like the FSIA itself—do not apply to non-sovereigns. Sovereign immunity is "designed to give *foreign states and their instrumentalities* some pro-

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[9] In a footnote, Argentina asserts that BNA is a foreign state. Pet. Br. 14 n.12. But BNA itself has never made such an assertion, and it did not appeal the district court's order. In any event, Argentina waived any argument that BNA is entitled to immunity by failing to raise that issue at the petition stage and by failing to develop any argument on the merits that BNA is entitled to immunity.

tection from the inconvenience of suit." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008) (emphasis added; internal quotation marks omitted); *see also* Pet. App. 19. In the discovery context, this means that sovereign immunity applies (if at all) "to protect *foreign sovereigns* from the burdens of litigation, including the cost and aggravation of discovery." *Rubin*, 637 F.3d at 795 (emphasis added); *see also* 28 U.S.C. § 1609 (applying only to "the property in the United States of a foreign state").

Foreign states do not face the "burdens of litigation" when they do not bear the responsibility of responding to the discovery at issue. *Rubin*, 637 F.3d at 795. Where, as here, a U.S. court has not forced a foreign state to shoulder the burden of assembling and producing information about its assets, no sovereign has been subjected to "the inconvenience of suit." *Pimentel*, 553 U.S. at 865 (internal quotation marks omitted). NML's subpoenas seek only business records from third-party banks that those banks already possess.

Argentina contends that it has shouldered burdens from the third-party discovery because it must protect the financial privacy of its officials and various entities associated with it. *See* Pet. Br. 46-47. Similarly, it protests that the discovery could "directly threaten national security" interests. *Id.* at 50. As the Second Circuit correctly recognized, however, these arguments "asser[t] a claim of privilege and not a claim of immunity." Pet. App. 19. If Argentina is "concern[ed] that the subpoenas will review sensitive information," *ibid.*, including confidential financial details or state secrets, it could have invoked "concepts of governmental privilege" to resist particular aspects of the discovery, H.R. Rep. No. 94-1487,

at 23. But those arguments do not implicate the FSIA, which "says nothing about privilege." Pet. App. 19.

The United States suggests in a footnote that confidentiality orders or privilege rulings will be inadequate because they raise risks of comity and reciprocity. *See* U.S. Br. 33 n.16. But district courts can amply address such concerns through their authority to "supervis[e] . . . discovery." *Société Nationale*, 482 U.S. at 546. Moreover, discovery about persons and entities *other than* the judgment debtor generally becomes necessary only where, as here, the debtor itself has acted in bad faith and structured its finances across other entities to avoid attachment. The FSIA does not grant sovereigns that defy judgments—or their non-sovereign confederates—any *"right"* to "conceal [their] assets from the district court and therefore avoid execution of . . . judgment[s]." *Richmark*, 959 F.2d at 1478.

Finally, Argentina complains of "additional 'inconvenience[s]'" that will purportedly result from third-party discovery, Pet. Br. 47 (alteration in original), but none withstands scrutiny. Argentina suggests that such discovery could "forc[e]" the foreign state "to defend itself in subsequent litigation." *Ibid.* But that would be true only if the district court had jurisdiction over the foreign sovereign in that litigation—in which case, the state is not entitled to avoid that inconvenience. Argentina also argues that the discovery could "yiel[d] information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery." *Ibid.* But that discovery is not improper when the sovereign's immunity from suit has been overcome, and the district court can cabin dis-

covery that becomes overly intrusive. And Argentina contends that third-party discovery could "forc[e] third parties to deem their burdens of discovery as a cost of doing business with a sovereign state, and to either pass those costs on to the state or refuse to do business with that state." *Ibid.* But even if this were so, there is no basis for concluding that the FSIA contains an implicit limitation on discovery based on these remote, attenuated, and speculative costs.

B. Argentina's Broad And Irrevocable Waiver Of Immunity Independently Justifies The Discovery Order.

In the bonds that Argentina has now repudiated, Argentina "irrevocably waived" and "agreed not to claim" "any immunity . . . f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy." J.A. 106. Moreover, Argentina affirmatively "consent[ed]" "to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment." *Ibid.*

Argentina's waiver expressly authorizes the post-judgment discovery ordered here, and this Court can affirm the judgment below based solely on this waiver.[10] Indeed, this Court has found an explicit waiver

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[10] Argentina contends that NML forfeited this contractual-waiver argument by not raising it below. *See* Pet. Br. 19 n.15. But NML argued in the district court that Argentina's contractual waiver "is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment." Dkt. Entry 412, at 4 n.2 (internal quotation marks omitted); *see also* Dkt. Entry 384, at 15 n.6 (arguing that Argentina had waived "immunity from execution and other judgment enforce-

[Footnote continued on next page]

of sovereign immunity in much less stark contractual language. In *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, this Court held that, by agreeing to arbitration and choice-of-law clauses in a standard-form construction contract, an Indian tribe had clearly and unambiguously waived its immunity from a state-court lawsuit to enforce an arbitration award—even though the contract did not specifically address the tribe's immunity. 532 U.S. 411, 415, 418, 423 (2001). The Court was satisfied that the tribe had effected a waiver because, under the arbitration rules and governing law to which the contract referred, the parties necessarily consented to judgments by the State's courts based on arbitration awards. *See id.* at 418-22. The Court held that the waiver was explicit even though it did not use the words "sovereign immunity." *Id.* at 420.

Both tribal immunity and foreign sovereign immunity are matters of congressional prerogative. *See Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Under the principles applied in *C & L Enterprises*, Argentina waived any immunity that it might otherwise possess from post-judgment discovery. Argentina expressly surrendered its immunity not only from lawsuits, attachment, and execution, but also from "*any other legal or judicial process or remedy*," and with respect to "the issue of any process in connection with" a judgment. J.A. 106 (emphasis added). Even without an explicit reference to "discovery in aid of execution," this language plainly encompasses post-judgment discovery. To hold otherwise would be to impose a "ritualistic formula" re-

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[Footnote continued from previous page]
ment process"). NML pressed the same argument before the Second Circuit. *See* NML C.A. Br. 32-33.

quirement on FSIA waivers—something this Court has long refused to do in assessing whether a sovereign has waived its immunity. *Franchise Tax Bd. of Cal.* v. *U.S. Postal Serv.*, 467 U.S. 512, 521 (1984) (internal quotation marks omitted).

Argentina insists that any contractual waiver is irrelevant because, "even with a waiver of immunity, a court's power is still limited to what the FSIA permits." Pet. Br. 19 n.15; *cf.* U.S. Br. 30 n.14. But the FSIA does not bar a foreign state from waiving any protections it may have against post-judgment discovery, and the authority to grant such discovery comes from the Federal Rules, not from the FSIA. Argentina's waiver forecloses it from invoking any limitations that the FSIA would otherwise impose on post-judgment discovery.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

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U.S. Const. art. I, sec. 8, provides in relevant part:

Section 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. III, sec. 1, provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, sec. 2, cl. 1, provides:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1330 provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising

out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1332 provides in relevant part:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

* * *

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1391 provides in relevant part:

§ 1391. Venue generally

* * *

(f) Civil actions against a foreign state—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving

rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1441 provides in relevant part:

§ 1441. Removal of civil actions

* * *

(d) Actions against foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

28 U.S.C. § 1602 provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United

States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub. L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be

barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A provides:

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabo-

tage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the

scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the pro-

gram under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any

pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section--

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606 provides:

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607 provides:

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608 provides:

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609 provides:

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610 provides:

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a

natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution,

upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attach-

ment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611 provides:

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Federal Rule of Civil Procedure 69 provides:

Rule 69. Execution

(a) In General.

(1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

N.Y. C.P.L.R. § 5223 provides:

§ 5223. Disclosure

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

United States District Court
for the Southern District of New York

NML Capital, Ltd. v. *Republic of Argentina*,
Case No. 1:08-cv-06978-TPG

Dkt. Entry 284, Declaration of
Eric C. Kirsch (January 20, 2011)

EXHIBIT B [excerpt]

Fiscal Agency Agreement
(October 19, 1994)

* * *

To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any Specified Court is located, in which any Related Proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any Specified Court or Other Court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, form attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment), provided that such waiver shall not be effective (i) with respect to the assets which constitute freely

available reserves pursuant to Article 6 of the Convertibility Law (the "Convertibility Law"), the amount, composition and investment of which will be reflected on the balance sheet and accounting statement of Banco Central consistently prepared pursuant to Article 5 of the Convertibility Law and (ii) with respect to property of the public domain located in the territory of The Republic of Argentina or property owned by the Republic and located in its territory which is dedicated to the purpose of an essential public service, and provided further that such agreement and waiver, insofar as it relates to any jurisdiction other than a jurisdiction in which a Specified Court is located, is given solely for the purpose of enabling the Fiscal Agent or a holder of Securities of this Series to enforce or execute a Related Judgment. The waiver of immunities referred to herein constitutes only a limited and specific waiver for the purpose of the Securities of this Series and the Fiscal Agency Agreement and under no circumstances shall it be interpreted as a general waiver of the Republic or a waiver with respect to proceedings unrelated to the Securities of this Series or the Fiscal Agency Agreement.

* * *

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-842

Supreme Court, U.S.
FILED
APR 14 2014
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In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As NML makes clear, to affirm the decision below, this Court must hold that supplemental proceedings for discovery in aid of execution against a foreign sovereign are utterly divorced from the presumption of immunity and strict limits that the FSIA imposes on execution itself. That counterintuitive position is wholly incompatible with the text, structure, history, and underlying principles of the FSIA, which provides the "sole basis" for U.S. courts to exercise authority over foreign states and their property. Discovery cannot be "in aid of execution" under Rule 69 or "relevant" under Rule 26 when the FSIA prohibits enforcement based on the information sought. It is particularly inappropriate to permit discovery to be unbounded by the substance of the FSIA, where these general discovery limitations are overlaid with the fundamental concern for comity and reciprocity that motivated the FSIA and pervades the law of foreign sovereign immunity.

NML's arguments to the contrary largely rely on the FSIA's "silence" on post-judgment discovery, which according to NML demonstrates Congress's intent for discovery in aid of execution to be unconstrained by the FSIA's enforcement immunities, and thus allowed even where the targeted property is categorically immune. But as this Court has recognized in analogous situations such as in Section 1983 actions, where immunity presumptively applies, no express Congressional statement about discovery is necessary: it is the nature of immunity itself that requires courts to limit any related discovery. NML concedes as much when it acknowledges—despite the FSIA's "silence" on

the issue—that the FSIA's jurisdictional immunity provisions limit jurisdictional discovery against foreign sovereigns. Resp. Br. 43. "Silence" on discovery in aid of execution is no more persuasive, when execution immunity is intentionally far broader, and the scope of discovery plausibly related to any potentially executable assets correspondingly narrower.

NML charges the Republic with "bad faith" for non-payment of judgments. Resp. Br. 39. But in establishing the FSIA's two-part immunity scheme—where sovereigns are afforded broader immunity from execution than from suit—Congress necessarily contemplated situations where U.S. judgments remain unpaid. NML's argument is thus an attack on Congress's basic scheme. The breadth of discovery in aid of execution against a foreign state does not depend upon a plaintiff's or district judge's views of whether a state is "good" or "bad." Any contrary rule would undermine one of Congress's primary goals in enacting the FSIA: to provide uniformity in the treatment of foreign sovereigns in U.S. courts. There is no FSIA exception where a sovereign (in the eyes of an unhappy creditor) allegedly has the capacity to pay, nor do the FSIA's immunities wane as the time a judgment remains unsatisfied grows.[1]

The uncontradicted fact is that the Republic was forced by a financial catastrophe to default on its debt,

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[1] When Congress wanted to permit broader execution remedies against a particular type of state—those designated by the Executive as sponsors of terrorism—it did so. *See* 28 U.S.C. §§ 1605A, 1610(f) and (g) (Stat. App. 16a–19a).

and restructured that debt on terms that 92 percent of its creditors accepted—far more than would suffice to bind all creditors under any bankruptcy regime, including that of the United States. Because there is no bankruptcy regime for insolvent states, holdouts like NML are free to litigate to collect more, but foreign states cannot fairly be expected to prefer them to the creditors who restructured.[2] Holdouts' difficulty in enforcing judgments because of Congress's decision to broadly immunize sovereign property from enforcement does not warrant misreading the FSIA for their benefit.

ARGUMENT

Even where foreign states are subject to jurisdiction for liability purposes, the FSIA makes all foreign-state property presumptively immune from judgment execution, and then provides narrow exceptions to that immunity. 28 U.S.C. §§ 1609–1611 (Stat. App. 13a–20a). These exceptions define the limits of judicial power in the execution context. Nothing in the text suggests an unspoken intent nonetheless to authorize unbounded discovery of *all* property of a foreign state, regardless of its immunity from execution under the FSIA, including property: (i) located outside the United States; (ii) not used for a commercial activity; (iii) belonging to a state's military and diplomatic core; (iv) belonging to a state's current and deceased former Presidents; or (v) belonging to foreign-state agencies or instrumentalities entitled under Section 1603 to their

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[2] Nor is there anything beyond a hearsay newspaper article to suggest that the Republic ever sought to "evade" any judgment against it. Resp. Br. 11, 48.

own immunities and presumptively separate from the state. Reading the FSIA to authorize such a worldwide "forensic examination" of a foreign state's property, as the Second Circuit did, is the "statutory construction with 'no basis or referent in [the statute's] language.'" Resp. Br. 2 (quoting *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011)).

A. Nothing in the FSIA Permits Post-Judgment Discovery Unbounded by the Statute's Substantive Enforcement Immunity

1. As NML does not contest, prior to the FSIA's enactment, no U.S. court *ever* ordered post-judgment discovery in aid of executing a judgment against a foreign state in the United States *or* abroad. *See* Pet. Br. 27; U.S. Br. 22 & n.10. At that time, foreign-sovereign property enjoyed virtually absolute immunity. Pet. Br. 26–27; U.S. Br. 2–3, 22. Thus, when the FSIA was enacted, discovery in aid of execution tracked the substantive immunity of foreign-state property in U.S. courts: there was no execution, hence no discovery in aid of it occurred. Nothing in the FSIA's text, structure, or legislative history suggests that Congress intended for the FSIA to depart from that commonsense approach by silently permitting post-judgment discovery wholly divorced from the new statute's execution immunity.

"Congress 'is understood to legislate against a background of common-law . . . principles,' and when a statute covers an issue previously governed by the common law, we interpret with the presumption that Congress intended to retain the substance of the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320

n.13 (2010) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)); *accord Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014); *see also Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337 (1988) ("historical context" provided "sufficiently clear indication" that award of pre-judgment interest not permitted, as Congress's intent to alter common law cannot be inferred *sub silentio*). This case is therefore not like *Samantar*, Resp. Br. 25–26, where the question was whether the FSIA, besides indisputably codifying the previous common law of foreign *state* immunity (with stated modifications, such as for the first time permitting even limited execution), also should be read to cover immunity claims of foreign *officials*. The FSIA clearly *does* cover all issues of foreign state immunity, and the question is whether, in providing narrow exceptions to otherwise absolute immunity from execution when enacting Sections 1609 through 1611, Congress somehow meant to grant carte blanche for discovery far in excess of those exceptions. It would take more than silence to infer such a result.

In dealing with "traditionally sensitive areas," like the comity and reciprocity concerns that go to the heart of the FSIA's immunity regime, the Court has recognized the need for a "clear statement," which "assures that the legislature has in fact faced, and intended to bring into issue," these "critical matters." *Solimino*, 501 U.S. at 109 (internal quotation marks omitted); *see also* Pet. Br. 34–35. Silence on these matters is wholly inadequate to impute to Congress the unlikely intent to authorize U.S. courts to act as a "clearinghouse for information . . . that might lead to attachments or executions anywhere in the world," Pet. App. 31, in the same breath as it enacted strict limits

on the scope of execution, attachment, and all supplementary procedures in aid of execution.

That the FSIA speaks about discovery in one instance in Section 1605(g)(1), Resp. Br. 27, has no bearing on NML's theory that silence means Congress otherwise intended to permit discovery in aid of execution without regard to the statute's substantive limits on execution. Section 1605(g) was enacted 20 years after the Act and does not deal with discovery directed to a foreign state at all, much less discovery concerning its presumptively immune property, but to a stay of otherwise available merits discovery directed to the *United States* in cases based on terrorism under Section 1605A, where such discovery "would significantly interfere with a criminal investigation or prosecution, or a national security operation" related to the cause of action. Stat. App. 7a.

Equally meritless is NML's attempt to infer such an intent from Congress's inclusion of special service rules on foreign states in Section 1608, supposedly in place of service under Federal Rule of Civil Procedure 4. Resp. Br. 27. Rule 4(j)(1) deals with service on a foreign state by referring to Section 1608 because, before the FSIA, there was no mechanism in the Federal Rules for such service, and the principal means of obtaining personal jurisdiction was by prejudgment attachment, which FSIA Section 1610(d)(2) abolished as a means of obtaining jurisdiction. *See* ABA Report No. 3, Section of International Law, 101 Annu. Rep. A.B.A. 1091, 1093 (1976); H.R. Rep. 94-1487 at 8 (1976) ("House Report") ("[T]his bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction

over, a foreign state."). By filling a gap in pre-FSIA law by enacting a service provision in Section 1608, Congress hardly expressed an intent to allow Rule 69 discovery "in aid of execution" to be unconstrained by the substantive limits on execution in Sections 1609 through 1611. Indeed, Rule 69 already stated that any "federal statute governs to the extent it applies." Resp. Br. 49–50; *see also* Point C, *infra*.

2. NML is on equally weak ground in suggesting that all "federal law must contain a 'plain statement of a pre-emptive intent' to displace the Federal Rules." Resp. Br. 41 (citing *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 539 (1987)); *see also id.* at 4, 27, 37. The Federal Rules, not least because of the relevance required under Rule 26, *support* the conclusion that the FSIA's broad immunities from execution constrain the scope of discovery in aid of execution against a foreign sovereign. Moreover, NML overreads *Aérospatiale*, where this Court held only that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—a treaty that provides procedures for parties in signatory states, including the United States, to obtain evidence located abroad—was intended as "a permissive supplement" to the Federal Rules' discovery procedures rather than "a pre-emptive replacement" of them, because no preemptive intent had been stated in the Convention. *Aérospatiale*, 482 U.S. at 536, 538. The Court expressed concern that finding preemption would cause the Hague Convention's more limited procedures to "replace completely the broad discovery powers that the common-law courts in the United States previously exercised," *id.* at 536, but that is hardly the case with

discovery in aid of execution on foreign-state property, which did not exist *at all* under pre-FSIA common law. Other than the fact that it reflects the Court's continuing concerns regarding comity issues, *Aérospatiale* has no relevance to the issue of whether a statute that sharply limits execution on foreign-state property for reasons of comity and reciprocity should nonetheless be interpreted to have nothing to do with discovery in aid of execution, or instead be read, as all but one courts of appeals have done, to limit discovery to what can be plausibly executed upon under those limits.[3]

3. NML's argument that the Federal Rules are an independent basis for judicial authority over foreign states and therefore do not need to be read consistently with the FSIA is meritless. The FSIA is the *exclusive* basis of U.S. court power in civil litigation against foreign states, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), and the language of Rule 69 subjects its execution procedures to applicable federal statutes. Moreover, NML's position is in sharp tension with *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). In *Pimentel*, the Court considered whether an interpleader action could continue under Rule 19(b) after the Philippines—a potential claimant to the interpleaded *res* also claimed by judgment creditors of

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[3] That the Ninth Circuit in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471, 1474 (9th Cir. 1992), affirmed discovery of "assets worldwide" against a state commercial instrumentality without explanation in a case concerning deference to foreign secrecy laws, and not the scope of the FSIA, is thin support for disregarding this limitation. Resp. Br. 31.

the former Philippine President—had been dismissed on sovereign immunity grounds. Notwithstanding that the FSIA makes no mention of Rule 19 or joinder of parties, the Court, noting that "[g]iving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine," held that the "[c]omity and dignity interests" of the Philippines outweighed the interests of respondents in collecting on their judgment, and ordered the outright dismissal of the interpleader action, even though the suit could have proceeded in its absence without directly violating the immunity from suit codified in Section 1604. *Id.* at 866–67, 869, 872. It did so, as Congress instructed courts to do, by applying the principles in the FSIA, 28 U.S.C. § 1602 (Stat. App. 1a), to a situation that the text does not directly address. *A fortiori*, these principles must be applied to discovery in aid of execution, when execution itself is expressly limited by the text, and discovery in aid of that execution under Rule 69 cannot logically be invoked when, by definition, it cannot furnish "aid" to something the statute does not allow.

4. NML's distinction between execution remedies directed to property, which are limited by Sections 1609 through 1611, and discovery in aid of execution, which is directed *in personam* at the state or others with information about immune property, proves far too much. Resp. Br. 44–45. Many execution remedies operate *in personam*, such as "turnover" under New York law and "assignment" under California law, but the courts of appeals agree that these remedies, which are clearly "in aid of execution" and would otherwise permit enforcement on property outside the United States, are necessarily limited by the FSIA to

executable property in the United States. *E.g.*, *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011) (affirming denial of turnover petition as violative of Section 1610(a)); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131 (9th Cir. 2010) (same with regard to assignment). Absent such a rule, the FSIA's execution limits literally would be rendered meaningless.[4]

Since the existence of *in personam* jurisdiction under Sections 1604 and 1605 cannot transcend the distinct execution limits in Sections 1609 through 1611, it likewise cannot be a basis for discovery that reaches beyond those limits in aid of execution. Sections 1604 and 1605 do not expressly limit discovery either, and yet NML accepts the rule of every court of appeals to address the issue that discovery to determine whether an exception to immunity from suit applies must be ordered circumspectly and only to verify facts crucial to an immunity determination. Resp. Br. 43; *see also* Pet. Br. 29–30. Given the far narrower limits of power to execute under Sections 1609 through 1611, it would be anomalous to ascribe to Congress, from the same silence, an intent to allow limitless discovery in aid of execution, simply because a court has *in personam* jurisdiction to adjudicate liability under Sections 1604 and 1605.

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[4] NML is wrong that foreign-state property outside the United States is not "immune," NML Br. 46; *see also* Pet. Br. 6, 37; U.S. Br. 24–26, but in any event does not dispute that U.S. courts may *not* execute on such property, and acknowledged as much to the Second Circuit, Dkt. Entry 120, at 34–35.

5. NML notes the Court's observation in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812), that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." Resp. Br. 42. But that seminal decision went on to announce as a matter of federal common law the virtually absolute immunity of foreign states in U.S. Courts. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). And after the State Department adopted the restrictive theory of sovereign immunity in 1952, the Department, and U.S. courts following its guidance, continued to recognize that foreign-state property was absolutely immune from execution. Pet. Br. 26–27; U.S. Br. 2–3.[5] Of course, Congress was always free to modify the rules, which it did in the FSIA, but its partial lowering of the previous barrier to *any* execution is hardly convincing evidence that it intended to ignore for purposes of discovery in aid of execution the barriers it retained.

6. NML's and its amici's efforts to ascribe to Congress various rationales for permitting discovery in aid of execution unconstrained by the FSIA's limited bounds of execution and proceedings in aid of execution

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[5] NML implies, Resp. Br. 41–42 n.5, that sovereign property was not absolutely immune prior to the FSIA by citing a single decision, *Flota Maritima Browning de Cuba, Sociadad Anonima v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619 (4th Cir. 1964). *Flota Maritima* was a factually unique case where the United States declined to file a suggestion of immunity and Cuba had waited three years to claim immunity after entering an appearance. It was also wrongly decided on the facts, as the court of appeals dissent described. *See id.* at 627–31. Regardless, a single outlier does not alter the pre-FSIA common law that the Court, the Executive, and Congress have all recognized.

are unconvincing. While NML would like to read into the statute a Congressional intent to help creditors enforce judgments in foreign jurisdictions, the well-settled procedure for creditors to obtain such enforcement would be to sue in those jurisdictions to obtain recognition of a U.S. judgment, and "then those courts can use their powers to assure enforcement of the judgment" under their own procedures and immunity laws. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750–51 (7th Cir. 2007).[6]

The sweeping decision below ignores this established procedure, and is calculated to enmesh U.S. courts in discovery applications brought by creditors around the globe to obtain boundless extraterritorial discovery against foreign states from non-U.S. sources in disputes having nothing to do with this country. For example, a German creditor, after obtaining recognition in the United States of German judgments against the Republic, was granted worldwide discovery of an even greater breadth than that at issue here, including discovery of assets *located in Germany*. *See* Order, *Scheck v. Republic of Argentina*, No. 10 Civ. 5167 (S.D.N.Y. Sep. 25, 2013).

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[6] NML intimates that an execution proceeding concerning property *in* the United States that it filed on March 25, 2014 (one day before submitting its merits brief) was based on the discovery ordered below. Resp. Br. 45 n.7. But this hardly explains why NML needs discovery of the Republic's immune property *outside* the United States. Although NML does not disclose this, it pursued execution on related property in the United States of the same Argentine instrumentality in 2011, which the court rejected as barred by FSIA Section 1609. *NML Capital, Ltd. v. Spaceport Sys. Int'l., L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011).

As this Court recognized in its first FSIA case, "Congress protected against th[e] danger" that U.S. courts would become international courts of claims for foreign plaintiffs suing foreign states "by enacting substantive provisions requiring some form of substantial contact with the United States," *Verlinden*, 461 U.S. at 490, including limiting judgment enforcement to property "in the United States . . . used for a commercial activity in the United States." 28 U.S.C. § 1610(a) (Stat App. 13a–14a). The lower courts' extraterritorial worldwide "clearinghouse" theory flies in the face of this limit.[7]

7. Finally, the former Legal Advisors of the State Department who are NML's amici themselves acknowledge that the FSIA must be read to prohibit categorically discovery in aid of execution on diplomatic and military property (and central bank reserves, absent an explicit central bank immunity waiver), because that property is categorically immune from execution in the first place. *See* Competitive Enterprise Br. 5–6.[8] This distinction, while it walks

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[7] NML is wrong that the Order below somehow does not act extraterritorially because personal jurisdiction exists over Argentina and the non-party banks, Resp. Br. 44–45: the Order explicitly requires the production of information from *outside* the United States concerning property *outside* the United States in purported aid of non-existent *foreign* proceedings that NML speculates might be brought. That NML, a foreign plaintiff, has a U.S. judgment does not change the analysis.

[8] Contrary to NML's assertion, Resp. Br. 47, the Republic did not waive any objections to discovery concerning diplomatic and military property or to the subpoenas' expansive definition of "Argentina." *See* Dkt. Entry 308, at 7–12 (subpoena improper

back from the most egregious aspect of the decision below and is welcome to that extent, is unconvincing: *all* property of a foreign state, *except* "property in the United States . . . used for a commercial activity in the United States," is equally categorically immune from execution under Section 1610(a). Stat App. 13a–14a. The same logic that concludes that one type of categorically immune property should be immune from discovery in aid of execution just as it is immune from execution itself applies with equal force to all immune property and all discovery in aid of execution on that property.

B. The Principles of Sovereign Immunity Codified in the FSIA Confirm That NML's Subpoenas Are Impermissible

NML does not contest that foreign sovereign immunity is premised on the principles of comity and respect for foreign states, protecting foreign states from the burdens and intrusions of litigating in U.S. courts, and protecting the reciprocal interests of the United States abroad. Interpreting the FSIA to permit blanket discovery of "all assets that Argentina possesses" all over the world, Resp. Br. 46–47, including military and diplomatic property, and property for which NML has made no showing of commercial use, as well as the property of dozens of

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because it does not exclude "diplomatic accounts" or "military property" and because it includes separate entities and officials); Dkt. Entry 400, at 5–6 (same).

separate entities and high public officials that NML has not even tried to equate with the Republic, significantly harms these interests.[9]

In a statute properly described as a "marvel of compression," *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300, 306 (2d Cir. 1981), Congress did not, and could not, spell out every application of sovereign immunity in the text of the FSIA. *See, e.g.*, 28 U.S.C. § 1603(d) (Stat. App. 2a) (leaving to courts determination of what qualifies as "commercial activity" by defining as "regular course of commercial conduct or a particular commercial transaction or act"); *id.* § 1605 (Stat. App. 3a–8a) (not addressing, for example, whether courts have discretion to decline to exercise jurisdiction under forum non conveniens doctrine or whether Act of State doctrine is preserved). Congress therefore specifically instructed courts that the "principles" underlying the statute must inform the resolution of all claims of sovereign immunity. *See id.* § 1602 (Stat. App. 1a).

NML tries in a footnote to explain away this statutory direction by claiming that because Section 1602 states that courts should look to the principles

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[9] NML is not helped by arguing that concerns about the sensitivity of such information constitute "a claim of privilege and not a claim of immunity." Resp. Br. 52. Whether the information may be privileged does not answer the logically and legally antecedent question of whether it is discoverable in the first instance, absent any showing that it relates to assets amenable to execution under the FSIA. *See also* Fed. R. Civ. P. 26(b), 69(a)(2) (Stat. App. 21a). Nor is NML helped by the fact that it addressed its subpoenas to non-parties, Resp. Br. 52, as improper discovery is not cured by changing the party from whom it is demanded.

"set forth" in the Act, Congress meant only that courts should follow the statute. Resp. Br. 34 n.2. Such a construction would render as surplusage not only the term "principles," but the sentence and section in which it is found. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"). Congress does not need to enact a statutory provision telling courts to follow the statute; that is the law. *See, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). By mandating that claims of sovereign immunity be decided in conformity with the principles set forth in the Act, Congress instructed that when claims of sovereign immunity are not expressly resolved by the FSIA's text, principles of sovereign immunity that undergird the statute should inform the Court's analysis.

The Court has regularly relied on the comity principles on which foreign sovereign immunity is grounded. *See, e.g.*, *Pimentel*, 553 U.S. at 866 ("[c]omity and dignity" interests of Philippines required dismissal of interpleader action in which Philippines no longer a party, even if plaintiffs would have more difficulty recovering their judgment); *Verlinden*, 461 U.S. at 486 ("foreign sovereign immunity is a matter of grace and comity"). These comity and dignity interests, not to mention the reciprocity interests of the United States, are manifestly flouted by permitting discovery on diplomatic and military property, as well as by a worldwide "forensic examination" that cannot possibly lead to execution within the narrow limits of foreign-state property upon which Congress authorized U.S. courts to execute.

To be sure, Congress was concerned to give creditors some limited ability to enforce judgments against foreign states. Resp. Br. 3, 35. But it drew the line on that ability quite clearly in Sections 1609 through 1611. Discovery unconstrained by these limits infringes the comity and immunity principles in the FSIA, without aiding the only execution that Congress permits.

C. The Text of Rule 69 Provides Further Support That the FSIA Limits Post-Judgment Discovery Against Foreign States

Rule 69 does not permit U.S. courts to order post-judgment discovery into assets that the FSIA itself immunizes from execution. Rule 69, which provides the general federal procedure for execution, states that a statute, like the FSIA, "governs to the extent it applies," and requires post-judgment discovery to be "in aid of" the judgment or execution. Fed. R. Civ. P. 69(a) (Stat. App. 20a–21a). The FSIA's sharp limits on execution of a judgment thus correspondingly limit the scope of discovery under Rule 69.

1. NML is incorrect to assert that the FSIA does not apply to discovery conducted pursuant to Rule 69 because Rule 69(a)(2), which provides for discovery in supplemental execution proceedings, does not state that a "federal statute governs to the extent it applies" as Rule 69(a)(1) does. Resp. Br. 50. At the time the FSIA was enacted, the substance of Rules 69(a)(1) and 69(a)(2) were collapsed into a single Rule 69(a). *Id.* at 48–49. Further, the supplemental proceedings involving discovery "in aid of execution" contemplated in Rule 69(a)(2) are plainly "proceedings

supplementary to and in aid of judgment or execution" addressed in Rule 69(a)(1). In any event, the Rules Enabling Act dictates that the Federal Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Thus, even without Rule 69's express direction that applicable federal statutes control, the FSIA and other federal statutes necessarily apply to post-judgment discovery, as to other supplemental proceedings (albeit, unlike other such proceedings, under what is now Rule 69(a)(2) a creditor can invoke state or federal discovery devices for this purpose).

Discovery proceedings in aid of execution are also a type of Rule 69 "supplementary proceeding" that the House Report states is encompassed by the term "attachment in aid of execution" in Section 1610 of the FSIA. Resp. Br. 48–50.[10] As the Second Circuit itself recognized, post-judgment discovery is not a free-standing power; a court's "power to order discovery to enforce its judgment" necessarily derives "from its power to conduct *supplementary proceedings*." Pet. App. 16 (emphasis added); *see also* Pet. Br. 52. And in the case of civil litigation against foreign states, pre- or post-judgment, the FSIA is the sole source of such power and defines its scope. *Amerada Hess*, 488 U.S. at 439.

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[10] NML again relies on an isolated statement in the House Report that "[t]he bill does not attempt to deal with questions of discovery." Resp. Br. 25. But this statement was made in a discussion of Section 1606, which addresses *liability*, not enforcement. House Report at 23. And the very next sentence states that "[e]xisting law appears to be adequate in this area." *Id.* The "existing law," as relevant here, was that discovery concerning foreign-state assets had never exceeded execution immunity and that Rule 69 permitted only discovery in "aid of execution."

2. NML suggests that the FSIA does not govern execution proceedings within the meaning of Rule 69 because it provides immunities that exempt property from execution, rather than a "procedure" for enforcing a judgment. Resp. Br. 50. Not so. The Advisory Committee Notes accompanying the Rule's adoption in 1937 specify that numerous "statutes of the United States on exemption from execution" expressly apply under Rule 69, Note to Subdivision (a) Fed. R. Civ. P. 69, notwithstanding that these statutes likewise do not provide methods of execution. *Accord Gary W. v. State of La.*, 441 F. Supp. 1121, 1126 (E.D. La. 1977) ("[I]f a federal statute is applicable, federal statutory exemptions govern execution practice."). NML's claim that Rule 69's reference to otherwise governing federal statutes deals with only procedure and not the substance of execution governed by those statutes is not what the Rule says or means.

3. Finally, NML overstates the legal support for its claim that discovery "[i]n aid of the judgment or execution" against a *private* defendant under Rule 69 includes discovery of assets in a foreign jurisdiction for the purpose of foreign execution. Resp. Br. 22–23. The Court has never endorsed this reading, and the plain language and structure of Rule 69 indicates that it authorizes discovery in aid of a "writ of execution" issued by a U.S. court under Rule 69(a)(1). *See* Stat. App. 20a–21a; *see also* Clearing House Br. 20–32. While the decisions in NML's cases could be justified as permitting discovery that could lead to Rule 69 execution on private persons' property using *in personam* remedies such as turnover, *see supra* at 9–10, they cannot justify worldwide discovery of foreign-state property, because the FSIA limits such

execution to property used for a commercial activity in the United States.

D. The Republic's Contractual Waiver of Sovereign Immunity Does Not Expand the Scope of Permissible Execution and Hence Discovery in Aid of Execution

NML's assertion that the Republic's waiver of immunity in its bond documentation "authorizes" the discovery ordered below is doubly misplaced. Resp. Br. 54–56. As an initial matter, NML failed to raise this argument in the district court, and the Second Circuit thus properly did not address it after NML belatedly raised the issue for the first time on appeal. Consistent with "this Court's practice," the Court should decline to consider this forfeited argument, as it was "neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990).

NML's contention that it properly raised the argument in a footnote in its district court reply brief fails. Resp. Br. 54 n.10. First, arguments raised only in footnotes are not preserved for appeal in the Second Circuit. *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003). Second, the footnote that NML cites does not even reference the Republic's waiver under the bonds. Dkt. Entry 412, at 4 n.2. Rather, it consists solely of a citation to *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002), a case that NML argues authorizes the discovery ordered below *without a waiver*. NML also references another district court footnote where it does quote language from the Republic's waiver. Dkt. Entry 384, at 15 n.6. However, NML invoked the Republic's waiver there only to

support its argument that the waiver might permit NML—in Belgium—to attach Republic property under Belgian law (a proposition rejected by the Belgian court, Pet. Br. 13 n.10). *Id.* at 15–16. In neither footnote, nor anywhere else before the district court, did NML suggest the Republic's contractual waiver supported the discovery of immune property under the FSIA.

In any event, NML's waiver argument is meritless. Every court to have addressed NML's position has rejected it. *See* Pet. Br. 19 n.15; *see also Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087 (9th Cir. 2007). This consistent line of authority holds that, as the statute's plain language states, even where a sovereign has broadly waived execution immunity in its bond documentation or in some other way, its assets are *still* immune from execution and attachment in aid of execution in U.S. courts unless they are both located in the United States and being used for a commercial activity here. *See* 28 U.S.C. § 1610(a) (Stat App. 13a–14a) ("The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune. . . *if*: (1) the foreign state has waived its immunity from attachment in aid of execution or from execution" (emphasis added)). Waiver or not, the FSIA provides the sole comprehensive scheme for enforcing judgments against a foreign state, *Verlinden*, 461 U.S. at 493, 496, and so

the FSIA's attachment and execution immunities necessarily define the scope of permissible discovery under the FSIA.[11]

The Ninth Circuit's decision in *Af-Cap*, which involved an immunity waiver nearly identical to the one at issue here, is particularly apposite. There, the Congo's waiver provided:

> To the extent that the [Congo] may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed) the [Congo] agrees not to claim and waives such immunity to the fullest extent permitted by the laws of that jurisdiction.

Af-Cap, 475 F.3d at 1087 (citation omitted). The Ninth Circuit rejected the plaintiff's claim that the Congo's waiver was sufficient to render the property at issue attachable, and stated that it "agree[d] with the Fifth Circuit that the waiver [of 1609 immunity] merely triggers the exception to the immunity from execution that would otherwise be in effect . . . . Rather than end our inquiry, [defendant's] waiver requires that we turn to the second requirement at issue in this case:

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[11] NML's reliance on *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), is misplaced. Resp. Br. 55–56. Principles of tribal immunity have no bearing on either common law immunity of foreign states pre-FSIA or, as regards the effect of waiver, the clear structure and language of the FSIA.

whether the property was 'used for a commercial activity in the United States.'" *Id.* (internal citation omitted). The court then noted, notwithstanding the Congo's broad waiver of immunity, that the post-judgment "FSIA discovery procedures" defined the "appropriate scope of discovery." *Id.* at 1095–96. That analysis is compelled by the language and structure of Sections 1609 and 1610(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 14, 2014

SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

No. 12-842

In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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637 F.3d 783 (7th Cir. 2011), *cert. denied*,
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SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner the Republic of Argentina (the "Republic") respectfully submits this supplemental brief under Rule 15.8 to bring to the Court's attention developments since the filing of the Petition that further demonstrate why certiorari should be granted, and further refute respondent's assertion that the Second Circuit's decision is narrow or limited in its implications.

1. The Petition presents a critical issue of federal statutory interpretation on which the courts of appeals are divided: whether the broad immunity from execution afforded foreign state property under the Foreign Sovereign Immunities Act ("FSIA") "does not affect" discovery in aid of execution on sovereign property, as held by the Second Circuit, Pet. App. A at 16, or instead limits asset discovery to property plausibly subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits. *Compare* Pet. App. A at 18 *with Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002); *see also* Pet. at 14-22; Reply at 1-4. Relying on the Second Circuit's erroneous decision, the district court, on September 26, 2013, entered a discovery order against the Republic (the "Discovery Order") that goes even further than the order that was the subject of the Second Circuit's decision, and shows the mischief and danger to the foreign relations of the United States from the court of appeals' error.

This latest Discovery Order, enabled by the Second Circuit's ruling that the FSIA has no bearing on discovery of sovereign property, compels the Republic to comply with broad asset discovery requests that target indisputably immune sovereign property, including not only property located outside the United States, but also sensitive military and diplomatic property that the FSIA shields from creditor remedies. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 26, 2013). The Discovery Order compels the Republic to produce to respondent wide-ranging categories of documents and information concerning *all* U.S. property owned by the Republic and 21 other entities, including the Ministry of Defense, the Ministry of Foreign Affairs, and the Central Bank of Argentina, as well as information detailing the Republic's relationship with the Central Bank and other entities whose property is not subject to execution for the Republic's debt. *See* Exhibit A to Declaration of Eric C. Kirsch, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. June 27, 2013). In a parallel order, the district court compelled the Republic to produce to other plaintiffs similarly broad categories of information concerning the property, wherever located around the world, of not only the Republic, but also 393 other entities, including military and diplomatic entities, entities separate from the Republic, and individuals such as the Republic's current and deceased former President. *See* Exhibit 1 to Declaration of Eric B. Finklestein, *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 10 Civ. 8339 (S.D.N.Y. Oct. 10, 2012); Exhibit K to Declaration of Daniel B. Rapport, *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715 (S.D.N.Y. May 27, 2013)

(reflecting revised list of entities defined as "Argentina").

Discovery of this nature against a foreign state is wholly unprecedented. We are aware of no case compelling a foreign state to comply with discovery, in purported aid of execution, that targets diplomatic and military property, without any showing whatsoever that the information sought could lead to the discovery of property subject to execution. One can readily imagine the reaction of the United States to an order of a foreign court demanding that it produce information in a civil action about its military and diplomatic assets abroad.

The district court could not have been clearer that in entering this unprecedented Order, it was relying entirely on the Second Circuit's decision, which had expressly disagreed with the Seventh, Fifth, and Ninth Circuits' holdings that discovery in aid of execution on sovereign property is limited by the FSIA. *See* Sept. 3, 2013 Hr'g Tr. at 31:1-5 ("[T]he Court of Appeals has made certain rulings on discovery. One of the central features of those rulings is that the Foreign Sovereign Immunities Act does not really prevent discovery of the kind being sought. That is out of the picture."); *see also id.* at 3:13-17 (NML's counsel stating that the Second Circuit ruled that the FSIA "does not have anything to do with post-judgment discovery. It is not a limitation on post judgment discovery, in that parties are entitled to discovery with respect to the assets of their judgment debtor. And the FSIA imposes no

restrictions on that."). [1] The unprecedented Discovery Order, by avowedly treating military and diplomatic property of a foreign state as open to full-bore U.S. discovery on the basis of the Second Circuit's ruling, puts the lie to respondent's assertion that this case creates merely an inconsequential circuit split on this weighty issue. NML Opp. at 15-18.

2. The Discovery Order also puts the lie to respondent's assertion that the Second Circuit's decision can somehow be limited to discovery of sovereign property directed to non-sovereign third parties. *Id.* at 11-14. The Second Circuit's erroneous ruling that the FSIA does not apply to post-judgment discovery in aid of execution is not so limited, and the Discovery Order relying on that decision is squarely directed to the Republic itself. Indeed, as was always to be anticipated, it is the same respondent that opposes certiorari because the Second Circuit's decision only involved discovery directed to non-sovereign banks that has now successfully invoked that decision to obtain broad discovery of immune property from the Republic directly.

3. Since the filing of the Petition, the Second Circuit's decision has created confusion among the district courts of other Circuits. In the Fifth and Sixth

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[1] The district court did not require respondent to make any showing that its discovery requests could lead to attachable property that could satisfy its U.S. judgments. Nor did plaintiffs demonstrate that property outside the United States was relevant in any way. As the Republic noted, plaintiffs' attempts to seize property in other countries have all been rejected as legally improper by those nations' courts. Pet. at 7-8.

Circuits, for example, district courts recently have been presented, in post-judgment proceedings involving respondent, with the same issues presented by the Petition, including whether discovery served on a non-sovereign third-party seeking information about immune property located outside the United States runs afoul of the FSIA. Recognizing the significance of the clear circuit split presented here and the uncertainty created by the Second Circuit's decision, those courts have stayed these discovery proceedings until the disposition of the Petition. *See* Stipulation for Stay of Proceedings, *NML Capital, Ltd. v. Republic of Argentina*, No. 13-mc-51030 (E.D. Mich. Sept. 19, 2013); Order Staying Case, *NML Capital, Ltd. v. Republic of Argentina*, No. 3:12-mc-86-L (N.D. Tex. Sept. 25, 2013); Order Staying Case, *NML Capital, Ltd. v. Republic of Argentina*, No. 3:12-mc-80-O (N.D. Tex. Sept. 25, 2013). The Court should give these lower courts the guidance they seek by granting the Petition and resolving the important issues presented by it.

CONCLUSION

The recent developments in the Republic's debt litigation further demonstrate the need for review of this case. The Petition should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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IN THE

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REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Just last year, the government recommended that this Court deny certiorari on the question whether post-judgment discovery from a foreign state is limited by the Foreign Sovereign Immunities Act of 1976 ("FSIA"). U.S. Br. 1, 8, 23, *Rubin* v. *Islamic Republic of Iran*, No. 11-431; *see also Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). There, the government maintained that the Seventh Circuit's decision denying post-judgment discovery to victims of state-sponsored terrorism did not warrant review because "the precise content and import" of that ruling "remain to be determined in future cases." U.S. Br. 8, *Rubin*, No. 11-431.

Since then, the Seventh Circuit has not elaborated on "the precise content and import" of its holding. Yet, in a reversal of course acknowledged only in the final footnote of its brief, *see* U.S. Br. 20 n.7, the government now urges this Court to grant certiorari and to sharply limit the ability of creditors and victims of terrorism to recover on their judgments against sovereigns. None of the government's reasons for reversing course has merit.

At the threshold, this case does not even present the question that *Rubin* did: This case presents only the splitless question whether FSIA attachment immunity limits post-judgment discovery from non-sovereign, third-party commercial banks. The government nevertheless contends (peculiarly) that this is a suitable vehicle for considering the FSIA's limits on post-judgment discovery from foreign states. U.S. Br. 21-22. The government insists that the Court "would not [be] *prevent*[*ed*]" from deciding the FSIA's

limits on discovery served on sovereigns, *id.* at 21 (emphasis added), but it cannot dispute that this Court could resolve the case without reaching that issue. *See* Opp. 12-14.

In any event, the government's contention that the Second Circuit's decision "creates" a circuit split with the Seventh Circuit's decision in *Rubin* (U.S. Br. 18) is wrong. The Second Circuit's decision breaks no new ground but instead follows circuit precedent established more than a decade before *Rubin* was decided. Indeed, the Second Circuit itself recognized that *Rubin* "conflicted with [its] holding" in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"). Pet. App. 17. But this Court already has adjudged that conflict unworthy of review.

And so the government devotes most of its brief to the merits contention that the FSIA limits post-judgment discovery. *See* U.S. Br. 8-17. But the FSIA's text provides no support for that argument. Indeed, the government concedes that the FSIA "does not expressly address the permissible scope" of post-judgment discovery. *Id.* at 9. It instead relies on supra-textual "principles" that it believes "the FSIA was enacted to implement and safeguard." *Id.* at 11. But courts may not adopt a statutory construction that has "no basis or referent in [the statute's] language," *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011), and there is none here. As the legislative history confirms, the FSIA "does not attempt to deal with questions of discovery." H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

The government's "principles" thus could operate, if anywhere, only as a restraint on a district

court's discretion in supervising post-judgment discovery. But any analysis of the discretionary judgment here must also take account of the fact that Argentina comprehensively waived its sovereign immunity, promised not to claim any such immunity, and consented to "the giving of any relief or the issue of any process in connection with" the judgments entered against it. Pet. App. 4 n.1.

And the analysis likewise must also address the fact that Argentina is a uniquely recalcitrant litigant: Argentina has "literally proclaimed its repudiation of its legal obligations" by prohibiting its government from negotiating with dissenting creditors. *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 279 (S.D.N.Y. 2010), *rev'd on other grounds*, 652 F.3d 172 (2d Cir. 2011). Instead it has litigated against NML, in particular, for more than a decade—inflicting massive burdens on this country's judicial system rather than negotiating a means to pay what it indisputably owes. And most recently, Argentina's highest officials "have publicly and repeatedly announced their intention to defy any rulings of [the Second Circuit] and the district court with which they disagree." *NML Capital, Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 238 & n.4 (2d Cir. 2013). Indeed, its counsel told the Second Circuit directly that "it 'would not voluntarily obey'" the district court's orders, "even if [they] were upheld." *Id.* at 238.*

The government sheepishly acknowledges Argentina's sordid history as a debtor, U.S. Br. 4 n.2; but it fails to note either Argentina's contractual consent to

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* The oral argument is available at http://cvn.com/proceedings/nml-capital-v-republic-of-argentina-oral-argument-2013-03-27.

relief or its brazen position that it will flout any adverse judgment, and instead asks the Court to expend its time and effort to help Argentina. There is no reason for this Court to do so.

I. This Case Is A Poor Vehicle For Resolving Any Question On Which The Courts Of Appeals Have Divided.

This case is a poor vehicle to address the question whether (or to what extent) FSIA attachment immunity limits post-judgment discovery from a foreign state: The discovery here was served on non-sovereign, third-party commercial banks doing business in New York, and the Second Circuit upheld the discovery order on that independent basis. *See* Opp. 12-14; *see also* Pet. App. 19. This Court accordingly could resolve this case on that basis alone, without addressing any question involving foreign states.

The government notes that Argentina challenges "both bases for the court of appeals' decision" and that the Court might "not [be] prevent[ed]" from deciding the question presented. U.S. Br. 21-22. But the government's desire for this Court to resolve that issue provides no assurance that the Court would be able to do so.

Nor is it relevant that NML "has taken the position" that the decision below "establishes that the FSIA does not prevent the district court from ordering worldwide, general asset discovery from Argentina itself." U.S. Br. 21-22; *see also* Argentina Supp. Br. 1-4. Argentina's disagreement with the discovery ordered by the district court against it can be resolved in Argentina's pending appeal from that order. *See NML Capital Ltd.* v. *Republic of Argentina*, No. 13-4054 (2d Cir. Oct. 25, 2013). The pendency of

a case that could present Argentina's question is no warrant for certiorari in a case that does not.

II. The Shallow Circuit Split Regarding Post-Judgment Asset Discovery From Foreign States Does Not Warrant This Court's Review.

Even if this case squarely presented an issue on which the courts of appeals have divided, review still would not be warranted. *See* Opp. 15-18. The lower-court division is the result of the Seventh Circuit's outlier decision that the FSIA limits discovery in aid of execution, *see Rubin*, 637 F.3d at 799, which this Court already has determined to be uncertworthy, *see* 133 S. Ct. 23. The weight of lower-court authority supports the view long endorsed by the Second Circuit: that post-judgment discovery "would not intrude upon [a foreign state's] sovereign immunity," *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*"), and that "[d]iscovery of a judgment debtor's assets" "is conducted routinely under the Federal Rules of Civil Procedure," *Rafidain II*, 281 F.3d at 54; *see also Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1471-72, 1475, 1477-78 (9th Cir. 1992).

The government claims that the Second Circuit "acknowledged" that its decision "creates a circuit conflict with the Seventh Circui[t]." U.S. Br. 18. But the Second Circuit *actually* stated that such a conflict already existed. As it explained, "to the extent" that *Rubin* "concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sov-

ereign," that decision "conflict[s] with [the] holding in *Rafidain II*." Pet. App. 17.

Declining to acknowledge that statement, the government instead disputes the Second Circuit's understanding of its own precedent. *See* U.S. Br. 18 n.6. The government insists that *Rafidain I* did not involve "the scope of post-judgment asset discovery." *Ibid.* But *Rafidain I* squarely held that "permit[ting] full discovery" against a sovereign judgment debtor "would not intrude upon [the foreign state's] sovereign immunity." 150 F.3d at 177.

The government is similarly unable to explain *Rafidain II*. It claims that the Second Circuit "emphasized that its holding concerned only 'the court's subject matter jurisdiction,'" and that "'[n]o doubt, courts should proceed with care' in ordering asset-related discovery." U.S. Br. 18 n.6 (quoting 281 F.3d at 54). But *Rafidain II* recognized that subject matter jurisdiction allows a court to order broad post-judgment discovery regarding sovereign assets; in counseling courts to "proceed with care," the court of appeals was recognizing only that a district court should exercise "discretion"—not that the FSIA limits post-judgment discovery. 281 F.3d at 54.

The Second Circuit's long-standing position is bolstered by the Ninth Circuit's decision in *Richmark*, which upheld an order requiring "an arm of the [Chinese] government" to provide "discovery [regarding its] assets worldwide," which was designed to "identif[y] . . . current assets in order to execute the judgment." 959 F.2d at 1471-72, 1475. The government suggests that *Richmark* did not involve a question of discovery under the FSIA because "[t]he court's only mention of the FSIA occurred in the context of its rejection of [the foreign sovereign instru-

mentality's] argument that the requirement that it post a bond in order to stay execution pending appeal was inconsistent with the FSIA." U.S. Br. 13 n.4. In fact, the Ninth Circuit's discussion of the FSIA occurred in the context of rejecting the argument that the instrumentality could avoid asset discovery based on execution immunity under the FSIA. *See* 959 F.2d at 1477-78.

Finally, the government is wrong to suggest (U.S. Br. 19) that the decision below conflicts with decisions cautioning that discovery should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks and alteration omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). The Second Circuit has endorsed this same approach, *see* Opp. 17 (citing *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007)), but it is not "based on an interpretation of FSIA preemption," *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process," *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (internal quotation marks omitted), which is perfectly consistent with the Second Circuit's emphasis on the "care" that district courts should exercise in this area, *Rafidain II*, 281 F.3d at 54. And the government does not—because it cannot—maintain that the district court's decision here to allow post-judgment discovery against a recalcitrant litigant that has consented to "any relief" or "any process" (Pet. App. 4 n.1) failed to show the adequate "circumspection."

The government cannot escape the position that it staked out in *Rubin*—that the question of the FSIA's limits on post-judgment discovery does not warrant review. The Court concluded that review was not warranted then, and neither Argentina nor the government has identified any change in the lower courts' positions to warrant review now.

III. The Decision Below Is Correct And Respects The Balance Struck In The Foreign Sovereign Immunities Act.

Federal law authorizes broad discovery in aid of execution. *See* Opp. 18-19. Congress kept that broad discovery apparatus in place in FSIA proceedings: While Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state," 28 U.S.C. § 1609; *see also id.* § 1610, neither section says anything about discovery. The Second Circuit correctly held that the FSIA permits the discovery sought here.

A. Claiming that post-judgment discovery must "respec[t] the general rule of immunity Congress established in Section 1609" of the FSIA, U.S. Br. 9, the government proposes the following rule: When a district court considers a discovery request regarding foreign-state property, the court must require "the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets." *Id.* at 12.

The text of the FSIA provides no support for this rule. Indeed, the government concedes that "the FSIA does not expressly address the permissible scope" of post-judgment discovery in aid of execution.

U.S. Br. 9. To the contrary, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011).

The government's proposed approach is also unworkable. If the judgment debtor were aware of a potentially attachable asset held by the foreign state, it would not need discovery to identify that asset. But judgment debtors "nee[d] discovery" to identify the assets *in the first place*. *Richmark*, 959 F.2d at 1478. Argentina has repeatedly attempted to "conceal its assets from the district court and therefore avoid execution of [the] judgment," "but it has no *right* to do so." *Ibid.*

The government maintains that discovery affects Argentina's immunity because FSIA immunity protects sovereigns not only from liability and asset seizure, but also from the costs and burdens related to litigation. U.S. Br. 10; *see also id.* at 11. But that is true only for immunity from suit, not attachment immunity. *See EM Ltd.*, 473 F.3d at 486 (rejecting discovery because the plaintiff "failed to 'sho[w] a reasonable basis for assuming jurisdiction' over" the foreign state (quoting *Rafidain I*, 150 F.3d at 176)). Although "immunity from suit" includes an "entitlement not to stand trial or face the other burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), the same reasoning does not apply to attachment immunity, which is implicated only after the foreign state's immunity from suit has been overcome. And it is particularly misplaced where the defendant has ***waived*** its immunity under the FSIA. Pet. App. 4 n.1. In any event, NML's subpoenas impose no burden of litigation on Argentina: The sub-

poenas seek only business records from third-party banks that those banks already possess.

B. Even if the discovery here had been directed to Argentina itself, discovery is not attachment or execution; it is only discovery—and thus is permitted under the FSIA. The government's contrary arguments lack merit.

First, the government contends that "[t]he subpoenas are improper insofar as they are directed to assets located outside the United States." U.S. Br. 12. But the discovery here—served on banks conducting business in New York and seeking to uncloak Argentina's flow of funds around the world, *see* Pet. App. 5-6—is calculated to locate assets both in and outside the United States. And United States courts are authorized to allow, and routinely order, discovery regarding assets in other states and countries. Opp. 20. Nothing in the FSIA prohibits such discovery in the sovereign context. The government emphasizes that United States courts lack authority to order *attachment* or *execution* on sovereign property located outside the United States, U.S. Br. 13, but that says nothing about their authority to order *discovery*. Based on that discovery, NML "can seek to execute the judgment in whatever foreign courts have jurisdiction over [Argentina's] assets." *Richmark*, 959 F.2d at 1478.

Second, the government contends that "the subpoenas seek information about certain categories of property that are almost certainly immune from attachment or execution." U.S. Br. 15. But the FSIA does not grant sovereigns that defy judgments a right of secrecy. As the Second Circuit recognized, "if and when NML moves past the discovery stage and attempts to execute against Argentina's property,

Argentina will be protected by principles of sovereign immunity . . . to the extent that immunity has not been waived." Pet. App. 20.

Third, the government claims that the discovery order "has significant implications for the United States' foreign relations," U.S. Br. 19, including the Executive's "comity and reciprocity concerns," *id.* at 17. The implausibility of the government's concerns is demonstrated by its inability to marshal one concrete example from the decade-plus since the Second Circuit cemented its position that the FSIA does not limit post-judgment discovery in aid of execution. In any event, sovereign immunity determinations now are made by the courts according to the FSIA—no longer according to ad hoc Executive suggestion. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 689-91 (2004). The FSIA represents Congress's attempt to *balance* comity and reciprocity principles with the interest in providing creditors with a forum to resolve disputes against foreign states. *See* Opp. 20-21. The Executive's invocation of foreign-relations concerns cannot impose limits on creditor process that the text of the FSIA does not.

C. Finally, even if the government were correct that the FSIA limited post-judgment discovery, that still would not warrant reversal of the decision below. Argentina has "irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted" by law, and "consent[ed] . . . to the giving of any relief or the issue of any process in connection with" the judgments against it. Pet. App. 4 n.1. Neither Argentina nor the government claims that the limitations they would impose on discovery are jurisdictional; instead, they arise either from the FSIA's non-jurisdictional limitations on at-

tachment and execution or from some free-floating privilege drawn from the asserted purposes of the statute. Accordingly, there is no basis for ignoring Argentina's waiver of any immunity that it might otherwise possess with respect to post-judgment discovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

REPUBLIC OF ARGENTINA, PETITIONER

v.

NML CAPITAL, LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, provides that the property of a foreign state in the United States is immune from attachment, arrest, and execution, 28 U.S.C. 1609, unless the property is "used for a commercial activity in the United States" and falls within a statutory exception to immunity, 28 U.S.C. 1610(a). The question presented is:

Whether the court of appeals erred in affirming a discovery order requiring the production of comprehensive information concerning a foreign state's assets, without regard to whether those assets could be attached or executed upon in the United States under the FSIA.

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In the Supreme Court of the United States

No. 12-842

REPUBLIC OF ARGENTINA, PETITIONER

v.

NML CAPITAL, LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the scope of discovery available in enforcing a judgment against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* The United States has a substantial interest in the proper interpretation and application of the FSIA's provisions and in the treatment of foreign states in United States courts. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (explaining that sovereign immunity rests on the "perfect equality and absolute

independence of sovereigns, and th[e] common interest impelling them to mutual intercourse"). For much of the Nation's history, the United States adhered to the "absolute" theory of foreign sovereign immunity, under which foreign states were not subject to suit without their consent and foreign sovereign property was wholly shielded from judicial execution. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983); *Permanent Mission of India to the United Nations* v. *City of N.Y.*, 551 U.S. 193, 199 (2007); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938).

During that period, the question sometimes arose whether that absolute immunity was applicable in a particular case. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 37 (1945). In recognition of the potential for international conflict inherent in such determinations, the courts developed the practice of deferring to the Executive Branch's judgment. See *Verlinden*, 461 U.S. at 486; *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). In many cases, the Executive filed a suggestion of immunity, which the courts treated as dispositive. See, *e.g.*, *Hoffman*, 324 U.S. at 34. If the Executive made no recommendation, courts would decide immunity questions "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Id.* at 34-35.

In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity. Under that theory, foreign states were entitled to immunity from suit for their sovereign or public acts but not for their commercial acts. See *Verlinden*, 461 U.S. at 487. Even after 1952, however, the "property of

foreign states" continued to be "absolutely immune from execution" to satisfy a judgment. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976) (*House Report*); see, *e.g.*, *New York & Cuba Mail S.S. Co.* v. *Republic of Kor.*, 132 F. Supp. 684, 685 (S.D.N.Y. 1955); Theodore R. Giutarri, *The American Law of Sovereign Immunity: An Analysis of Legal Interpretation* 254-259, 263-266 (1970).

In 1976, Congress enacted the FSIA, 28 U.S.C. 1330, 1602 *et seq.*, which establishes comprehensive "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.*; see 28 U.S.C. 1602 (noting recognition of restrictive theory in "international law" and providing that "[c]laims of foreign states to immunity should henceforth be decided * * * in conformity with the principles set forth in this chapter").

First, the FSIA sets forth a general rule that foreign states are immune from suit in U.S. courts, 28 U.S.C. 1604, and that such courts may exercise jurisdiction over a foreign state only if the suit comes within one of the specific exceptions to that rule, see 28 U.S.C. 1605-1607; *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). Those exceptions permit, *inter alia*, suits as to which "the foreign state has waived its immunity," 28 U.S.C. 1605(a)(1); suits based on the commercial activities of a foreign state carried on in the United States, 28 U.S.C. 1605(a)(2); and suits based on a foreign state's tortious acts or

omissions causing personal injury or death in the United States, 28 U.S.C. 1605(a)(5).

Second, the FSIA addresses the circumstances in which foreign-state property is subject to attachment, arrest, or execution. Section 1609 establishes a general rule that foreign-state property in the United States is immune from any such enforcement, even in cases in which jurisdiction over the state itself is proper. See 28 U.S.C. 1609 (stating that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as [otherwise] provided"). Section 1610(a) then sets forth limited exceptions to that general rule, providing that foreign-state property in the United States "shall not be immune" from execution if it is "used for a commercial activity in the United States" and at least one of certain enumerated conditions (such as waiver of execution immunity, or use of the property "for the commercial activity upon which the claim is based") is satisfied. 28 U.S.C. 1610(a). The statute also mandates that even where an exception listed in Section 1610(a) would otherwise apply, certain foreign-state property nevertheless remains immune: property of a "foreign central bank or monetary authority held for its own account," 28 U.S.C. 1611(b)(1), and property used or intended to be used in connection with a military activity, 28 U.S.C. 1611(b)(2).

2. In 2001, petitioner Republic of Argentina (Argentina) "declared a temporary moratorium on principal and interest payments on more than $80 billion of public external debt." *NML Capital, Ltd.* v. *Banco*

Cent. de la República Arg., 652 F.3d 172, 175 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). Since 2001, Argentina has not made payments on the defaulted bonds. *Ibid.* Instead, Argentina restructured approximately 92% of its debt by instituting global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms. *Id.* at 176 & n.4.

Respondent holds debt instruments on which Argentina defaulted. Respondent did not avail itself of Argentina's restructuring process for those bonds; rather, respondent (along with other bondholders) filed multiple actions in the United States District Court for the Southern District of New York seeking repayment of the original debt obligations. See Pet. App. 3-4. As a basis for the district court's jurisdiction over Argentina, respondent relied on a waiver of sovereign immunity from suit that was contained in the agreement governing the debt instruments when they were first issued. See *id.* at 4 & n.1; see also 28 U.S.C. 1605(a)(1).

Respondent ultimately obtained judgments against Argentina in the combined amount of approximately $1.6 billion. The district court also has granted summary judgment to respondent in six other cases in which respondent has demanded more than $900 million, including interest. Pet. App. 4.[1]

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[1] In the latter cases, the district court enjoined Argentina from making payments on the restructured bond debt unless it simultaneously makes payments on the original bond debt, and the Second Circuit affirmed the injunctions. See 727 F.3d 230 (2013). In doing so, the court of appeals rejected the position of the United States as amicus curiae that consensual restructuring is the appropriate means for resolving sovereign debt crises; that the injunc-

3. a. Because Argentina has not satisfied the judgments against it, respondent has "attempted to execute them against Argentina's property."[2] Pet. App. 4. In 2010, in an effort to "learn how Argentina moves its assets through New York and around the world," respondent served document subpoenas on two nonparty banks, Bank of America and Banco de la Nación Argentina (BNA). *Id.* at 5 (citation omitted); see *ibid.* (explaining inquiry into Argentina's "financial circulatory system") (citation omitted); *id.* at 41 (describing discovery as facilitating "forensic examination"). Unlike previous discovery requests, which had focused on Argentina's property located in the United States, the two subpoenas sought information about Argentina's assets located outside the United States. *Id.* at 5-6, 11 & n.6, 60-61. Both subpoenas sought comprehensive information relating to bank accounts maintained by Argentina anywhere in the world, as well as transaction histories and records of electronic funds transfers involving Argentina as a party. *Id.* at 5-6. The subpoenas also demanded the same information with respect to various Argentinian entities and persons—including government agencies, instrumentalities, and certain officials and employees—against whom respondent had not obtained a judgment. See 1:03-CV-

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tions could disrupt the orderly resolution of such crises; and that the injunctions were inconsistent with the FSIA and the well-established understanding of the *pari passu* clause that appeared in the bonds. A petition for a writ of certiorari is pending (No. 13-990 (filed Feb. 18, 2014)).

[2] The United States does not condone a foreign state's failure to satisfy the final judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina should normalize relations with its creditors, both public and private.

08845 Docket entry No. (Docket No.) 338-1, at 13-18 (Aug. 9, 2010); Docket No. 366-1, at 1-2 (Nov. 1, 2010).

b. The district court approved the subpoenas "in principle" and granted respondent's motions to compel the banks' compliance. Pet. App. 7.[3] Although Argentina contended that the subpoenas were inconsistent with the FSIA's grant of presumptive immunity from execution, the court concluded that discovery into the worldwide assets of Argentina and related persons and entities was appropriate. *Id.* at 43-44. The court reasoned that Argentina could "very well be engaged in commercial activities in various places or activity which might involve attachable assets on some other theory in a foreign country." *Id.* at 44. The court stated that it intended to serve as a "clearinghouse for information about [Argentina's] commercial activity or other activity that might lead to attachments or executions anywhere in the world." *Id.* at 31; see Docket No. 457, at 7 (Apr. 19, 2012); see also *id.* at 4, 6, 15, 18-19 (requiring BNA to produce information on "transactions from Argentina to Spain or Argentina to Brazil" that never "came into the United States").

4. Argentina appealed the discovery order. The court of appeals affirmed, concluding that "Argentina's sovereign immunity is not infringed" by the order compelling the banks to comply with respondent's

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[3] The district court instructed the parties to negotiate about the subpoenas' terms, which were modified in certain respects. See Pet. App. 7-8, 10 n.5, 45, 49, 50-51. With respect to the BNA subpoena, for example, this resulted in withdrawal of requests for information about assets located in Argentina and accounts held by natural persons other than Argentina's president and her late husband. See *id.* at 8; Docket No. 452 (Dec. 14, 2011).

broad subpoenas. Pet. App. 9, 20; see *id.* at 87-88 (denying rehearing).[4]

First, the court of appeals stated that post-judgment discovery into a foreign state's property "does not implicate * * * immunity from attachment under the FSIA" because "[i]t does not allow [respondent] to attach Argentina's property." Pet. App. 15; see *id.* at 18. In the court's view, "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party," *ibid.*—including approving the kind of "broad post-judgment discovery in aid of execution" that the Second Circuit identified as "the norm in federal and New York state courts," *id.* at 13; see *id.* at 16. The court rejected the argument that discovery in aid of execution of a judgment against a foreign state must be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin* v. *The Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012), cited in Pet. App. 17. The court deemed such "circumspect[ion]" appropriate only when a plaintiff seeks discovery "to initially establish that the court has subject matter jurisdiction over a sovereign." *Id.* at 18-19.

Second, the court of appeals stated that "the Discovery Order does not infringe on Argentina's sovereign immunity" because "the subpoenas at issue were directed at * * * commercial banks that have no claim to sovereign immunity." Pet. App. 19. In the court's view, "the banks' compliance" will "cause Ar-

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[4] The court of appeals exercised jurisdiction over the appeal under the collateral-order doctrine. Pet. App. 9-12.

gentina no burden and no expense," and "Argentina's sovereign immunity" is therefore not "endanger[ed]." *Id.* at 19-20.

SUMMARY OF ARGUMENT

The FSIA sets forth two separate and independent rules of immunity: immunity of a foreign state from suit, and immunity of the property of a foreign state from attachment, arrest, or execution. Each of those immunities has exceptions, but those exceptions are also independent of each other—and the exceptions with respect to immunity from execution are considerably narrower than the exceptions that permit a U.S. court to exercise jurisdiction over a foreign state. A foreign state's property therefore may remain immune from execution under the FSIA even though the foreign state is subject to a judgment entered by a U.S. court. That carefully constructed framework preserves comity—since judicial seizure of a foreign state's property may be regarded as a serious affront to the state's sovereignty and affect our foreign relations with it—and addresses concerns about reciprocity for the United States when sued abroad.

Consistent with these immunity provisions, a district court's authority to order discovery into the property of a foreign state is necessarily limited, and extends only to assets as to which there is a reasonable basis to believe that an exception to execution immunity under the FSIA applies. Broad, general discovery into presumptively immune foreign-state property would impose the very costs and burdens that the immunity is intended to shield against in the first place. Discovery therefore must be restricted to the facts necessary to verify that assets fall within the scope of such an exception—exactly the kind of tailoring that courts undertake in various other immunity contexts, including qualified immunity

cases. A court has jurisdiction over a foreign state in the first place only because a FSIA exception applies, and the FSIA and its exceptions therefore define the scope of the inquiry in which that court can engage.

Permitting more sweeping examination of a foreign state's assets by U.S. courts, thereby opening a substantial gap in what this Court has recognized to be a comprehensive scheme, would undermine the FSIA's purposes and have a number of adverse consequences. It would invade substantially a foreign state's sovereignty in an especially sensitive area and would be inconsistent with the comity principles the FSIA embodies. It would risk reciprocal adverse treatment of the United States in foreign courts. And it would more generally threaten harm to the United States' foreign relations on a variety of fronts. If Congress had wanted to authorize courts to issue discovery orders that could disrupt foreign policy in this way—a radical change to the prior legal regime, in which discovery of foreign-state property was not even contemplated because such property was absolutely immune from execution—Congress would have said so expressly. But it gave no indication of any such intent.

The district court in this case, styling itself a "clearinghouse" for virtually all information about Argentina's assets (Pet. App. 31), compelled discovery of several categories of foreign-state property that a U.S. court could not possibly execute against pursuant to the FSIA. The court improperly compelled discovery directed at assets located in other countries, even though the FSIA does not permit execution by a U.S. court except with respect to limited categories of foreign-state property located in the United States. The court also improperly compelled discovery of categories of property that are expressly immune from execution not only in the United

States but also elsewhere: central bank and military property, diplomatic property, and property belonging to individuals (including a sitting head of state) and entities other than the judgment debtor.

In allowing that discovery to proceed, the court of appeals believed that jurisdiction over Argentina authorized the discovery and that Argentina's sovereign immunity was not "affected" (Pet. App. 3). That approach disregards the separate immunity for foreign-state property that applies under the FSIA even when jurisdiction over a foreign state is proper. It takes no heed of the fact that a primary purpose of execution immunity is to protect against the burdens of litigation, including the burdens that Argentina has shouldered in this case. And, critically, it disregards the significant comity, reciprocity, and other foreign-relations concerns raised by wide-ranging discovery that treats a foreign state as if it were a mere private litigant—concerns that are not lessened when the discovery is directed at a bank or other third party. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

Under the Second Circuit's rule of decision, a district court may order sweeping discovery into a foreign state's property—including discovery against the foreign state itself—without regard to whether the discovery seeks information about property that is subject to execution in a U.S. court under the FSIA.[5]

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[5] Indeed, district courts have already relied on the Second Circuit's decision in ordering general asset discovery against a foreign state itself. See Docket No. 562, at 29-31; Docket No. 565 (Sept. 25, 2013); see also, *e.g.*, *Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-CV-2715, Docket entry No. 592 (S.D.N.Y. Sept. 25, 2013); *Thai Lao Lignite (Thai.) Co., Ltd.* v. *Government of Lao*

That rule, which as in this case would allow discovery into a foreign sovereign's assets anywhere in the world, cannot be reconciled with the FSIA and the principles of comity and reciprocity it embodies.

A. The FSIA Establishes A General Rule Of Immunity From Execution For A Foreign State's Property

The FSIA codifies long-recognized foreign sovereign immunity principles by setting forth two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an exception to jurisdictional immunity applies. See 28 U.S.C. 1604-1607. Second, the property of a foreign state is immune from attachment, arrest, or execution unless an exception to that distinct rule of execution immunity applies. See 28 U.S.C. 1609-1611.

The exceptions to jurisdictional immunity and execution immunity are similar in certain respects, but they operate independently. Accordingly, "a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." Restatement (Third) of Foreign Relations Law of the United States § 456(1)(b) (1987); see *id.* § 456 cmt. e (citing 28 U.S.C. 1605 and 1610); see also *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

In addition, under the FSIA the exceptions to the immunity from execution afforded to foreign-state property are considerably narrower than the exceptions to the immunity from jurisdiction afforded to a

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People's Democratic Republic, 924 F. Supp. 2d 508, 518-519 (S.D.N.Y. 2013).

foreign state. In general, the property of a foreign state may be executed upon to satisfy a judgment only if the property is "used for a commercial activity in the United States" and certain other conditions are satisfied. 28 U.S.C. 1610(a).[6] When Congress enacted the FSIA against the backdrop of the established sovereign immunity regime that gave a judgment debtor no ability *at all* to execute against a sovereign's property, it only "partially lower[ed] the barrier of immunity from execution." *House Report* 27; see *id.* at 8 (FSIA execution provisions "remedy, in part, the [pre-FSIA] predicament of a plaintiff who has obtained a judgment against a foreign state").

As a result, a foreign state may be subject to a judgment entered by a U.S. court with jurisdiction to render it and yet the foreign state's property may remain immune under the FSIA from execution upon that judgment. See, *e.g.*, *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985); see also *Rubin* v. *The Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010); see *Walters*, 651 F.3d at 289.

The FSIA's narrow exceptions to the general rule of immunity from execution strike a careful balance intended to preserve comity and address reciprocity concerns. The "judicial seizure" of a foreign state's

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[6] In the context of certain terrorism-related judgments, somewhat different provisions may be applicable. See 28 U.S.C. 1610 note.

property "may be regarded as an affront to its dignity and may . . . affect our relations with it." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation and internal quotation marks omitted). Indeed, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002); see *Peterson*, 627 F.3d at 1127; *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14, 22 (1973) (statement of Acting Legal Adviser Brower); Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998) (Brownlie) (noting that "forcible execution directed against [foreign-state] assets * * * may lead to serious disputes").

In light of these concerns, a prior court order is necessary to attach or execute upon a foreign state's property. 28 U.S.C. 1610(c). A judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; *Rubin*, 637 F.3d at 796; *Walker Int'l Holdings Ltd.* v. *Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

B. Discovery Into The Property Of A Foreign State Must Be Consistent With The FSIA's Immunity Provisions

Factual issues may arise when a judgment creditor seeks to demonstrate that a foreign state possesses assets that fall within one of the FSIA's exceptions to

execution immunity. In that circumstance, discovery may be appropriate to develop facts establishing that the assets in question are subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances,[7] a district court ordering discovery in aid of execution should not proceed as though only private interests were implicated. To the contrary, discovery must be tailored in a manner that respects the general rule of immunity from execution set forth in Section 1609, and may extend only to assets as to which there is a reasonable basis to believe that an exception to execution immunity under Section 1610 applies.

1. That conclusion follows from the very nature of immunity, which protects against "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd.* v. *Republic of Arg.*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert. denied, 552 U.S. 818 (2007); see *Pimentel*, 553 U.S. at 865 (immunity is designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity protects government officials from "the costs of trial or * * * the burdens of broad-reaching discovery") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution

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[7] Only one provision of the FSIA, not relevant here, directly addresses a discovery-related matter. See 28 U.S.C. 1605(g) (allowing for stay of discovery against the United States in action relating to alleged terrorist acts by foreign state).

under the FSIA, would impose the very burdens and costs that immunity is intended to shield against and would therefore be inconsistent with the FSIA's execution immunity provisions. See 28 U.S.C. 1609-1611; *Rubin*, 637 F.3d at 795-797.

Indeed, courts in various immunity contexts have confined the scope of discovery to encompass only facts that are necessary to verify an alleged exception to immunity. Of particular relevance here, with respect to the jurisdictional immunity of a foreign state under the FSIA, the courts of appeals have uniformly limited discovery so as to "balance the need for 'discovery to substantiate exceptions to statutory foreign sovereign immunity' against the need to 'protect[] a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) (quoting *First City, Tex.-Hous., N.A.* v. *Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)); see, *e.g.*, *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) (recognizing that such discovery "must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure").[8] Similarly, in cases involving the qualified immunity of federal and state officials, discovery has been restricted so as to encompass only the facts necessary to decide

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[8] See also *Hansen* v. *PT Bank Negara Indon. (Persero), TBK*, 601 F.3d 1059, 1063-1064 (10th Cir. 2010); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir.), cert. denied, 531 U.S. 979 (2000); *Federal Ins. Co.* v. *Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993), cert. denied, 511 U.S. 1107 (1994); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988), abrogated on other grounds by *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607 (1992).

whether the immunity defense applies. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 646-647 n.6 (1987) (discovery "should be tailored specifically to the question of [the defendant's] qualified immunity"); *Cole* v. *Ruidoso Mun. Schs.*, 43 F.3d 1373, 1387 (10th Cir. 1994).

The same considerations are implicated in the context of discovery into a foreign state's property for purposes of execution. Broad, general discovery into the character, use, location, or amount of a foreign state's property without regard to whether those assets are subject to execution in U.S. courts is no more appropriate, and no less intrusive, than broad, general discovery into the acts of a foreign state without regard to whether the state itself is subject to the jurisdiction of our courts. Because foreign-state property is presumed immune under the FSIA, and because that immunity is lifted only in limited circumstances and only as to property located in the United States and used for commercial purposes, a district court may not simply require disclosure of "all" of a foreign state's assets. *Rubin*, 637 F.3d at 785. Instead, it must proceed consistently with the general rule of immunity set forth in Section 1609.

All of the courts of appeals other than the Second Circuit to have addressed the issue have taken such a carefully tailored approach. Thus, as in the context of jurisdictional discovery under the FSIA, those courts have ruled that discovery concerning a foreign state's assets "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin*, 637 F.3d at 796; see *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007); *Connecticut Bank*, 309 F.3d at 260 n.10.

2. Confining discovery to assets as to which there is a reasonable basis to believe that an exception to immunity under the FSIA applies also follows from the fact that the court has jurisdiction over the suit to begin with only because of an exception to the immunity of the foreign state under the FSIA's "comprehensive" statutory regime. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). A foreign state that becomes subject to the jurisdiction of a U.S. court because of an exception to its immunity in the United States under that statutory regime does not thereby become subject to free-ranging judicial inquiry into its affairs that fall outside the FSIA's exceptions—much less that take place outside the United States, anywhere in the world. Moreover, as part of the FSIA's comprehensive regime, Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment, even if they are subject to the court's jurisdiction—and attendant discovery—for purposes of adjudicating the merits of the underlying suit. See 28 U.S.C. 1609; *Peterson*, 627 F.3d at 1127-1128; see also 28 U.S.C. 1602 (stating that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States * * * in conformity with the principles set forth in th[e] chapter" of which Sections 1609 and 1610 are a part).

3. Confining the scope of discovery in aid of execution in this manner not only follows from the text and structure of the FSIA, but also reflects the critical interests at stake and the extent to which a sweeping examination would undermine the purposes of the FSIA.

a. Sweeping requests for detailed information about a foreign state's financial holdings and transactions would represent a substantial invasion of its sovereignty and be

inconsistent with the comity principles that the FSIA embodies. As noted above, the "judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity" at least to the same extent as subjecting a foreign state to suit. *Pimentel*, 553 U.S. at 866 (citation and internal quotation marks omitted). By the same token, permitting extensive discovery in aid of execution, without regard to whether any of the property inquired into may actually be subject to execution in U.S. courts under the FSIA, could impose significant burdens on the foreign state and impugn its dignity. Foreign states may be acutely sensitive to the invasiveness of such discovery requests because "the scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for the S.D. of Iowa*, 482 U.S. 522, 542 (1987); see *id.* at 546 (explaining that courts ordering extraterritorial discovery should "demonstrate due respect for * * * any sovereign interest expressed by a foreign state"); Restatement (Third) of Foreign Relations Law of the United States, § 442, rep. n.1 (1987) (noting significant "friction" that can result from extraterritorial discovery requests); cf. *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 763 (2014) (relying on "international comity" considerations and noting that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals").

Undermining international comity in this way is exactly the kind of harm that FSIA execution immunity is intended to prevent. In enacting a "comprehensive set of legal standards" to govern treatment of foreign states in U.S. courts, *Verlinden*, 461 U.S. at 488; see *id.* at 493, 496, Congress took care to preserve immunity from execution separately from, and more broadly than, immuni-

ty from jurisdiction. Parlaying jurisdiction for purposes of issuing a judgment on liability into an authorization for a court to order expansive discovery in aid of execution that a U.S. court cannot order would ignore the FSIA's carefully calibrated statutory structure and the objectives it was fashioned to further. It thereby would open a significant gap in the FSIA's comprehensive array of protections, and strongly increase the possibility that U.S. courts would issue orders that constitute an affront to foreign states' coequal sovereignty.

b. Such broad discovery could lead to reciprocal adverse treatment of the United States in foreign courts—a result that the FSIA is also aimed at avoiding. See *House Report* 9; see also *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (one basis for foreign sovereign immunity is "reciprocal self-interest"). The United States maintains extensive overseas holdings in support of its worldwide diplomatic, security, and law enforcement missions, and engages in widespread financial transactions (both in the United States and internationally) in connection with those and other activities. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a U.S. court's allowance of unduly broad discovery concerning a foreign state's assets—especially assets beyond the jurisdiction of U.S. courts—could result in less favorable treatment for the United States in various respects when sued abroad. Cf. *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of "concept of reciprocity" in international law and diplomacy and explaining that respecting diplomatic immunity of foreign states "ensures that similar protections will be accorded"); *McCulloch* v. *Sociedad*

Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations"); *Persinger*, 729 F.2d at 841 (declining to adopt construction of FSIA that bore the "potential for international discord and for foreign government retaliation").[9] The United States, for example, would be gravely concerned about orders of a foreign court setting itself up as a "clearinghouse" (Pet. App. 31) for information about assets and transactions of the United States Government throughout the world, especially through compulsory discovery or disclosure orders issued at the behest of a private litigant.

c. Allowing sweeping discovery into foreign sovereigns' assets would also threaten harm to the United States' foreign relations more generally. Such discovery is likely to breed resentment, and if different district courts reach different results with respect to different foreign states—some permitting unlimited asset discovery, others imposing discretionary limits—then a perception of unequal treatment could arise. In the "vast external realm, with its important, complicated, delicate and manifold problems," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), perceived affronts

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[9] Many foreign states have statutory provisions embodying a reciprocity principle. See, *e.g.*, Foreign States Immunities Act 1985 s. 42(1) (Australia) ("Where the Minister is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State."); State Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Canada) (similar); The State Immunity Ordinance, No. 6 of 1981, s. 16 (Pakistan) (similar); State Immunity Act, 1985, s. 17 (Singapore) (similar); State Immunity Act, 1978, c. 33, § 15(1) (Great Britain) (similar).

to foreign states over discovery issues may result over the long term in reduced cooperation in a variety of areas. That is the opposite of what the FSIA was intended to accomplish. See *House Report* 26-27 (expressing intent to "ease the conduct of foreign relations by the United States").

4. Congress should be expected to have spoken clearly if it actually intended to hazard such consequences by authorizing litigants to harness the power of U.S. courts to obtain discovery regarding foreign-state assets that are not subject to execution under the FSIA—including assets outside the United States that may be immune from execution or shielded from discovery, and be subject to specialized judicial proceedings, under the law of the state in which they are located.

It is important to keep in mind the backdrop against which Congress legislated. See *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992); *Isbrandtsen Co., Inc.* v. *Johnson*, 343 U.S. 779, 783 (1952). Congress lifted only partially, and only in specified circumstances, what had previously been absolute immunity from execution against foreign-state property—a regime that necessarily did not contemplate discovery into a foreign state's assets for purposes of execution.[10] When Congress created limited exceptions to that execution immunity with regard to property in the United States, it may well have contemplated that some limited discovery in aid of execution by U.S. courts would be appropriate. Cf. *House Report* 23 (stating in context of discussion of jurisdictional immunity that the FSIA does not expressly "deal with questions of discovery" because "[e]xisting law

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[10] We are not aware of any examples of such discovery prior to enactment of the FSIA. None appear in the legislative history of the FSIA, and the court below did not cite any.

appears to be adequate"). But had Congress intended to adopt an unprecedented approach to foreign-asset discovery, moving from no examination whatever to broad compulsory disclosure without regard to whether an asset was subject to execution in the United States, it surely would have said so. See *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006); *Church of Scientology* v. *I.R.S.*, 484 U.S. 9, 17 (1987). It is particularly unlikely that Congress would have silently undertaken such a radical departure from established norms in the context of a statute so highly sensitive to comity and reciprocity concerns and to the dignity of foreign states.

More generally, Congress must be presumed to be aware of "the danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663-1665 (2013). Unfettered judicial inquiry, driven by the interests of private parties, into the details of a foreign state's assets —whatever their nature (*e.g.*, military, law enforcement, and intelligence assets), and wherever they may be located throughout the world—surely would constitute such unwarranted interference, and Congress therefore could be expected to have given some affirmative indication if it wanted to extend the reach of a U.S. court to that unusual extent. See *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) ("For us to run interference in * * * a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."); cf., *e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010).

Congress gave no such indication in the FSIA. To the contrary, the FSIA is wholly focused on execution taking place inside the United States by U.S. courts. See 28

U.S.C. 1609, 1610. In light of the FSIA's text, history, and context, the only reasonable conclusion is that Congress did not contemplate broad asset discovery without regard to whether execution pursuant to the order of a U.S. court under 28 U.S.C. 1610(c), based on an exception to the general rule of immunity under the FSIA, is available. A district court therefore does not have authority to order such discovery.[11]

C. The Discovery Permitted By The Court Of Appeals Is Inconsistent With These Principles

1. In this case, the district court (sustained by the court of appeals) disregarded the foregoing limitations by failing to require respondent to confine its discovery request to assets that could reasonably be expected to fall within an exception to FSIA execution immunity and be subject to execution in the United States. The district court exceeded its authority by compelling discovery that, in multiple respects, encompasses assets as to which there is no reasonable basis for disclosure.

a. Most centrally, the subpoenas at issue are improper insofar as they are directed to assets located in other countries. The FSIA provides that only foreign-state property that is both situated "in the United States" and "used for a commercial activity in the United States" is subject to execution, and only if certain additional requirements are met. 28 U.S.C. 1610(a). The FSIA therefore does not authorize U.S.

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[11] Even were the question here one of discretion rather than authority, the principles described above should be respected. At the least, as in other analyses under the Federal Rules, see, *e.g.*, *Pimentel*, 553 U.S. at 866-867; *Société Nationale*, 482 U.S. at 542-545, such discretion must be exercised with due regard for comity and the immunity protections afforded by the FSIA.

courts to order execution against sovereign property located outside the United States. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property * * * wherever that property is located around the world."), cert. denied, 552 U.S. 1231 (2008); cf. *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 379-380 (D.C. Cir. 2011) (identifying "serious[]" concerns raised by extraterritorial asset discovery against foreign sovereigns). Because discovery directed to assets located outside the United States is by definition not confined to aiding the court in exercising the limited execution authority conferred by Sections 1610 and 1611, the district court should not have allowed such discovery.

Respondent has argued (Br. in Opp. 20) that a foreign state's property located outside the United States enjoys no protection (and that a state therefore enjoys no protection from the burdens of discovery concerning that property) because the FSIA's guarantee of immunity applies only to a foreign state's "property *in the United States*." 28 U.S.C. 1609 (emphasis added). But the statute's exclusive focus on property located within the United States simply confirms the fundamental proposition that it would be unthinkable for a U.S. court, acting pursuant to carefully crafted exceptions to immunity under the FSIA, to presume to order the attachment of or execution against property of a foreign sovereign abroad. The FSIA—which establishes the comprehensive and exclusive framework for obtaining and enforcing judgments against a foreign state in U.S. courts, see *Argentine Republic* v. *Amerada Hess Shipping Corp.*,

488 U.S. 428, 434-435 (1989)—authorizes U.S. courts to order execution, and therefore discovery, only with respect to limited categories of foreign-state property that are located in the United States. Broader discovery of extraterritorial foreign-state assets that are not subject to execution under the FSIA would be irreconcilable with the principles of comity and reciprocity embodied in the statute.

A judgment creditor of a foreign sovereign, like a judgment creditor of a private defendant, can attempt to "obtain recognition" of a judgment in another country and call on that country's courts, consistent with that country's laws, to provide assistance in locating and executing against any assets that may be present there. *Autotech*, 499 F.3d at 751. Notably, because other jurisdictions generally allow much more limited discovery than is available in the United States, see *Société Nationale*, 482 U.S. at 546, respondent likely could not obtain the discovery it seeks in the courts of many foreign states. Moreover, the assets in question may be immune from execution or specifically shielded from discovery under the law of the state in which they are located. Respondent's effort to compel the disclosure in the United States of information about a foreign state's worldwide assets would thus circumvent the limitations imposed and protections afforded not only by the FSIA but also by foreign law, thus heightening the possibility of friction between Nations. See *ibid.*; *House Report* 26-27; see also *Peterson*, 627 F.3d at 1127-1128; cf. *Kiobel*, 133 S. Ct. at 1664-1665, 1668-1669.

b. In addition, the subpoenas improperly seek discovery of categories of property that are expressly immune from attachment or execution in the United

States and elsewhere: central bank and military property, diplomatic property, and property belonging to persons or entities other than the judgment debtor.

First, the subpoenas seek information about assets held by Argentina's Central Bank and its Ministry of Defense, see Docket No. 338-1, at 15, 18 (J.A. 63, 73), which are immune from execution under the FSIA. The FSIA provides that "the property * * * of a foreign central bank or monetary authority held for its own account" is absolutely immune from execution except where the central bank's immunity has been "explicitly waived." 28 U.S.C. 1611(b)(1). The FSIA also exempts from execution property that "is, or is intended to be, used in connection with a military activity" where the property is "of a military character" or "is under the control of a military authority or defense agency." 28 U.S.C. 1611(b)(2). Many other countries have adopted similar protections. See, *e.g.*, State Immunity Act, R.S.C. 1985, c. S-18 § 12(3) and (4) (Canada) (immunity for military and central bank property); Israel Foreign States Immunity Law, 5769-2008, §§ 17(d), 18 (same); The State Immunity Ordinance, No. 6 of 1981, s. 15(4) (Pakistan) (immunity for central bank property); State Immunity Act s. 16(4) (Singapore) (same).

Second, the subpoenas encompass diplomatic property, see Docket No. 338-1, at 13-14 (J.A. 57-63), which is categorically immune from execution under both the FSIA and international law. The FSIA specifically carves out "property * * * used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" from operation of the statute's immovable-property exception to immunity from execution. 28 U.S.C. 1610(a)(4)(B). Additionally,

the Vienna Convention on Diplomatic Relations, to which the United States is a party, mandates that "premises" and "property" of a diplomatic mission "shall be immune from * * * attachment or execution." Vienna Convention on Diplomatic Relations art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 3228, 500 U.N.T.S. 95, 108; see *id.* art. 25 (requiring "full facilities for the performance of the functions of the mission"); 28 U.S.C. 1609 (stating that immunity from execution, and any exception thereto, is "[s]ubject to existing international agreements to which the United States is a party"). Courts have applied these provisions in determining that assets used for diplomatic purposes are not subject to execution. See, *e.g.*, *767 Third Ave. Assocs.* v. *Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir.), cert. denied, 510 U.S. 819 (1993); *Avelar* v. *J. Cotoia Constr., Inc.*, No. 11-CV-2172, 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) (holding that "[b]ank accounts used by [a] mission for diplomatic purposes" are immune from execution); see also, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011 (Fr.), http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html (affirming vacatur of attachments with respect to accounts related to the Argentine Embassy because funds were immune diplomatic property); Brownlie 347 & n.115.[12]

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[12] Central bank, military, and diplomatic property is also recognized as immune from execution under the United Nations Convention on Jurisdictional Immunities of States and Their Property. See G.A. Res. 59/38, art. 21(1)(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). Although the United States is not a party to that Convention and it has not yet entered force, it is the view of the United States that many of the Convention's protections, including these, reflect accepted international principles and practices regarding foreign-state immunity.

Third, the subpoenas are improper insofar as they seek information about the assets of persons and entities not subject to a judgment in respondent's favor, including Argentina's sitting president and independent agencies and instrumentalities. At least, absent a threshold showing that assets held by an individual actually belong to the state, an individual's assets could not be attached to enforce a judgment against a foreign state. And the FSIA—consistent with law in other countries—does "not permit execution against the property of one agency or instrumentality to satisfy a judgment against another," unless the plaintiff overcomes the presumption that separate juridical entities should "be treated as such."[13] *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983) (quoting *House Report* 29-30); see *id.* at 626-627 & n.18, 629; see also, *e.g.*, *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 563-565 (11th Cir. 1987); *De Letelier*, 748 F.2d at 799.

Argentina is the sole judgment debtor here. Respondent has not established that any individual from whom it sought discovery is holding Argentina's assets. Nor has it established that any agency or instrumentality from which it sought discovery is "so extensively controlled by its owner" as to create "a relationship of principal and agent," or that it would "work fraud or injustice" to recognize such an entity's separate juridical status. *First Nat'l City Bank*, 462 U.S. at 629; see *id.* at 631-632. Moreover, respondent's requested discovery as to third parties—particularly with respect to a sitting head of state over whom the

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[13] As amended, the FSIA creates an exception to that principle, not relevant here, with respect to certain terrorism-related judgments. See 28 U.S.C. 1605A, 1610(g).

district court lacks jurisdiction—raises extraordinarily sensitive foreign policy concerns.

2. The court of appeals nevertheless allowed the discovery at issue to proceed, concluding that the rules governing discovery in aid of execution in cases involving private parties are fully applicable to a foreign state over which the district court has jurisdiction. The court's reasons do not withstand scrutiny.[14]

As an initial matter, the court of appeals erred in reasoning (Pet. App. 18) that once the district court "had subject matter * * * jurisdiction over Argentina," it could order discovery in aid of execution "as over any other party." That view mistakenly conflates the question of a court's jurisdiction to conduct supplemental enforcement proceedings, see *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-380 (1994) (recognizing that federal courts generally have "ancillary jurisdiction" to "effectuate [their] decrees"), with the nature and scope of relief that a court is empowered to afford in those proceedings. Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment. See 28 U.S.C. 1609; *Peterson*, 627 F.3d at 1127-1128.

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[14] In opposing certiorari, respondent argued that Argentina "'irrevocably waived'" its immunity, Resp. Supp. Br. in Opp. 11 (quoting Pet. App. 4 n.1), and thereby forfeited its right to object to post-judgment discovery. That issue need not be addressed here, since the court of appeals did not pass on it. In any event, the FSIA makes clear that waiver does not alone suffice to lift immunity from execution; a waiver of such immunity is effective only with respect to property present "in the United States" and "used for a commercial activity." 28 U.S.C. 1610(a)(1); see, *e.g.*, *Connecticut Bank*, 309 F.3d at 247.

That conclusion is not affected by the fact that under Federal Rule of Civil Procedure 69 "broad post-judgment discovery in aid of execution is the norm" in a "run-of-the-mill execution proceeding." Pet. App. 13-15. The FSIA, and the policies of comity and reciprocity that it reflects, provide protections that are not generally applicable in private-party litigation, including protections against subjecting sovereigns to "unwarranted litigation costs and intrusive inquiries." *Rubin*, 637 F.3d at 796-797. And Rule 69 itself provides that "a federal statute" like the FSIA "governs" where "appli[cable]." Fed. R. Civ. P. 69(a)(1); see *Rubin*, 637 F.3d at 794-795.

The court of appeals was also wrong to conclude that "because the district court ordered only discovery, not the attachment of sovereign property, * * * Argentina's sovereign immunity is not affected." Pet. App. 3. That conclusion disregards one of the basic purposes of sovereign immunity: to protect against the burdens of litigation, which include discovery. The court's assessment also disregards the distinct and significant foreign-relations concerns raised by wide-ranging discovery into a foreign state's assets as if the state were a private litigant. Indeed, this Office is informed by the Department of State that the decision below has raised significant concerns in that regard for the United States. The prospect of individual judgment creditors pursuing broad and intrusive inquiries into foreign sovereign financial holdings, potentially disrupting the foreign state's banking relationships, or delving into a head of state's bank accounts in the context of a suit against her government, could create serious impediments to the United States' bilateral relationships and have negative con-

sequences for the treatment of the United States in foreign courts. Cf. *Kiobel*, 133 S. Ct. at 1668-1669 (discussing reciprocity concerns for treatment of U.S. citizens in foreign courts).

Finally, the court of appeals erred in ruling that because the "discovery is directed at third-party banks, Argentina's sovereign immunity" under the FSIA "is not affected."[15] Pet. App. 3; *id.* at 19-20. Section 1609 provides that "the *property* in the United States of a foreign state shall be immune" from attachment and execution, 28 U.S.C. 1609 (emphasis added), and such immunity therefore "inheres in the property itself," *Rubin*, 637 F.3d at 799. Of course, the ultimate ability of a judgment creditor to attach or execute against sovereign property does not vary depending upon the party from whom asset discovery is sought.

Because the discovery at issue here is directed to property owned by or asserted to be owned by the foreign state (even if, as may often be the case, the requested information is in the possession of third parties), the foreign state has a substantial interest in the discovery. The disclosure of potentially sensitive financial information, without regard to whether the assets could be executed upon in the United States, is legitimately of significant concern to a foreign state regardless of who is required to make the disclosure. Third-party discovery requests concerning a foreign

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[15] Although the court of appeals assumed that the subpoenas were directed to non-immune private banks, Pet. App. 19, that court has previously held that BNA is a sovereign instrumentality of Argentina—which would mean that BNA and its property are presumptively immune under the FSIA. See *Seijas* v. *Republic of Arg.*, 502 Fed. Appx. 19, 20-23 (2d Cir. 2012) (unpublished); Pet. Br. 14 n.12.

state's property thus implicate the same comity and reciprocity concerns that are raised by discovery sought directly from the foreign state. Cf. *Société Nationale*, 482 U.S. at 546.[16] Moreover, contrary to the court of appeals' decision (Pet. App. 19-20), discovery requests directed at third parties may burden the foreign state itself, as it may have to participate in litigation over the scope and manner of the discovery, as Argentina has had to do in this case. Cf. *Rubin*, 637 F.3d at 796-797.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[16] Those concerns are not ameliorated by a confidentiality order or withholding of privileged information. See Pet. App. 19-20. Such measures do not address the fact that any disclosure at all may raise significant comity and reciprocity concerns.

STATUTORY APPENDIX

1. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of

this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

4. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign

state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which

may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive know-

ledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action

brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security

operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules

12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

5. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so des-

ignated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign

state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract a-

warded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this

section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

6. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

7. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

8. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state,

by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision

thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

9. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

10. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not

be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury

and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

11. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be im-

mune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR ADDITIONAL FAMILY MEMBERS OF VICTIMS OF STATE-SPONSORED TERRORISM AS AMICI CURIAE SUPPORTING RESPONDENT

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BRIEF FOR ADDITIONAL FAMILY MEMBERS OF VICTIMS OF STATE-SPONSORED TERRORISM AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE AMICI CURIAE*

Amici are the surviving family members or estates of victims of state-sponsored terrorism. Using their federal statutory rights to seek compensation for their losses, amici have pursued recompense from the foreign states that sponsored the terrorist attacks. They either already hold money judgments or are now actively litigating claims for monetary relief against foreign states for acts of state-sponsored terrorism.

Amici submit this short brief to add their voices to the arguments made in a brief filed by their fellow victims of state-sponsored terrorism, Beverly Burnett et al. ("Brief for Family Members and Estates of Victims of State-Sponsored Terrorism as Amici Curiae Supporting Respondent"; hereinafter "Burnett brief"). As described below, many years of terrorist acts against Americans have led to litigation against a variety of foreign sovereigns who have sponsored terrorism. The amici joining this brief provide additional perspective on the number of terrorist acts,

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* Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk or being lodged herewith. No counsel for a party authored any portion of this brief. No party and no other entity, except *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

and the number of victims and survivors, who could be affected by a decision that severely curtails the ability to seek post-judgment discovery against foreign sovereigns in such cases.

Victims of North Korean state-sponsored terrorism: On May 30, 1972, 26 innocent people were killed and over 80 were wounded in a terrorist attack at Lod Airport in Tel Aviv, Israel. Seventeen of the victims were residents of Puerto Rico on a pilgrimage to Israel, including American citizen **Carmelo Calderón-Molina**, who was killed in the attack and whose estate is an amicus here. The attack was a joint operation of two terrorist organizations, the Japanese Red Army and the Popular Front for the Liberation of Palestine, and it was facilitated by, *inter alia*, material support provided by the Democratic People's Republic of North Korea; North Korea's Cabinet General Intelligence Bureau; and by the predecessor of the State of Libya. In *Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441 (D.P.R. 2010), the district court awarded $78 million in compensatory damages and $300 million in punitive damages to the estates and surviving family members of Mr. Calderón-Molina and another victim. This judgment remains unsatisfied, and efforts to collect continue.

The estate and the other judgment creditors have obtained support in identifying assets from the U.S. Treasury Department's Office of Foreign Assets Control. Congress added a provision to the Foreign Sovereign Immunities Act (FSIA) directing the Secretary of the Treasury and the Secretary of State to assist plaintiffs like amici in identifying assets to satisfy

terrorism-related judgments. *See* 28 U.S.C. § 1610(f)(2); Burnett brief § II.A.

Victims of the attack on USS *Cole*: On October 12, 2000, the U.S. Navy destroyer USS *Cole* was attacked by a terrorist bomb while in the Port of Aden, Yemen. The attack was carried out by Al Qaeda operatives and supervised directly by Osama bin Laden. Seventeen U.S. Navy sailors were killed and 42 others were injured. Among those killed were Electronic Warfare Technician First Class Kevin Shawn Rux and Fireman Patrick Howard Roy. Amici **Saundra Flanagan, James Rux, Thomas Rux, Timothy Rux, and Matthew Rux** are Kevin Rux's surviving mother and brothers. They are pursuing claims for monetary damages against the Islamic Republic of Iran, the Republic of Sudan, and the Syrian Arab Republic. *See Flanagan v. Islamic Republic of Iran*, No. 1:10-cv-1643 (D.D.C. filed Sept. 28, 2010).

Amicus **Kevin Roy** is Patrick Roy's surviving brother. Mr. Roy is pursuing claims for monetary damages against the Republic of Sudan. *See Kumar v. Republic of Sudan*, No. 2:10-cv-171 (E.D. Va. filed April 16, 2010). The Republic of Sudan has twice been found liable for the bombing of USS *Cole* by virtue of the material support and resources it provided to Al Qaeda in the planning, preparation and execution of the attack. *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C. 2012); *Rux v. Republic of Sudan*, 495 F.Supp.2d 541 (E.D. Va. 2007).

ARGUMENT

As set out in the Burnett brief, foreign states—including state sponsors of terrorism—enjoy no immunity from post-judgment discovery under the FSIA. To the contrary: the United States Congress has taken steps to ensure that the victims, and their families, are able to secure compensation through the American civil justice system. To prevent that guarantee from becoming entirely hollow, this Court should reject Argentina's position that the FSIA severely limits post-judgment discovery.

CONCLUSION

For the reasons stated in the Burnett brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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BRIEF *AMICUS CURIAE* OF AGUDAS CHASIDEI CHABAD OF UNITED STATES IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF AGUDAS CHASIDEI CHABAD OF UNITED STATES IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE*

Agudas Chasidei Chabad of United States (hereinafter "Chabad") is an American non-profit religious corporation that is the policy-making and umbrella organization for the world-wide Chabad-Lubavitch movement. The movement was founded in Russia in the Eighteenth Century and is an Orthodox Jewish spiritual movement that has been led by a succession of "Rebbes" – rabbis recognized

* Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *amicus* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

by their followers as possessing exceptional spiritual qualities.

In November 2004 Chabad instituted an action under the Foreign Sovereign Immunities Act ("FSIA") against the Russian Federation, the Russian Ministry of Culture and Mass Communication, the Russian State Library, and the Russian State Military Archive for the taking, in violation of international law, of Chabad's "Library" of more than 12,000 volumes that had been stored in a Moscow warehouse and was seized by the Bolsheviks during the October Revolution of 1917 and of an "Archive" of more than 25,000 Chabad-owned documents and books taken as "trophy documents" in September 1945 by the Red Army from a castle in Poland.

Russia initially participated actively in the litigation through United States counsel in the District Court and in the United States Court of Appeals for the District of Columbia Circuit. The district court rejected Russia's motion under the FSIA to dismiss Chabad's claim to recover the "Archive" seized by the Red Army. It sustained Russia's motion under the FSIA to dismiss Chabad's claim to the "Library." *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6 (D.D.C. 2006). Russia appealed the denial of its motion regarding the "Archive" to the District of Columbia Circuit, and Chabad cross-appealed from the dismissal of its claim for the "Library."

The court of appeals ruled in favor of Chabad with regard to both the "Archive" and the "Library." *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008). Following remand of the case to the district court, Russia withdrew from the litigation, claiming that the court in which had theretofore litigated vigorously lacked jurisdiction.

Chabad then proceeded to present evidence to sustain entry of a default judgment. On July 30, 2010, the district court concluded that Chabad had "met its burden of proving a *prima facie* case against defendants" and entered a default judgment. The district court thereafter directed that an Order To Show Cause why they should not be held in contempt be served on the defendants. On January 16, 2013, the district court held the defendants in contempt of court and entered "civil contempt sanctions against the defendants in the amount of $50,000 per day until defendants comply" with the court's order.

The accumulated total due to date for Russia's disobedience and contempt of the district court's order exceeds 15 million dollars ($15,000,000). Chabad intends to seek enforcement of the contempt sanction against assets that are subject to attachment and execution in the United States or abroad. Chabad intends to discover assets that might be subject to attachment and execution by standard discovery procedures in United States courts.

This Court's decision on the legal issue presented in this case could affect Chabad's ability to find assets that might be attached in order to coerce compliance with the district court's order in *Chabad v. Russian Federation*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Chabad's case differs from the case that is now before the Court in two major respects that are relevant in determining both the outcome and scope of any decision issued in this case.

First, Chabad and many other past, current and potential plaintiffs in lawsuits against foreign states lack the resources that have enabled the respondent in this case to pursue enforcement of judgments against petitioner Argentina. Individual plaintiffs or entities like Chabad that are non-profit and are dependent upon voluntary charitable contributions will only be able to enforce judgments against foreign sovereigns that can litigate exhaustively if the plaintiffs can use efficient discovery procedures to find a foreign state's assets that are accessible under the FSIA. Limiting discovery as petitioner Argentina requests and as the Seventh Circuit has held would severely impair successful plaintiffs' efforts to enforce district court judgments.

Second, unlike the respondent NML, Chabad is not seeking to enforce a money judgment for damages. Chabad and similarly situated plaintiffs –

including individuals who have filed FSIA lawsuits to recover artworks and other property seized during the Holocaust – are attempting to enforce judicial injunctions that direct a foreign state to return property that was taken in violation of international law. The traditional means of securing compliance with judicial commands is to impose civil contempt fines for continued deliberate non-compliance. Finding a foreign state's assets that might be attached and executed upon in order to coerce compliance with an injunctive order is essential to upholding the dignity and efficacy of the judiciary and its orders. Restricting discovery that would enable a plaintiff to implement the command in a court order is, we submit, damaging not only to the particular plaintiff but also to the respect that should be accorded to the judicial process.

We note in this *amicus* brief that if petitioner Argentina's legal position is approved by this Court and the decision of the Court of Appeals for the Second Circuit is reversed, district court injunctive orders against foreign states are likely to become dead letters. Foreign states will be able to disobey and disregard considered judgments of American courts. The provisions of the FSIA that authorize the entry of orders restoring ownership of property taken in violation of international law will effectively become nugatory if full traditional discovery is restricted and a plaintiff cannot use discovery procedures to find a foreign state's assets, including property that the foreign state is holding outside the United States.

The Russian Federation has been a paradigmatic contemnor in the litigation initiated by Chabad. It retained highly qualified American counsel to argue that Chabad's claims in United States courts should be dismissed under the FSIA. When it was unsuccessful in its attempt to end the lawsuit under American law, it thumbed its nose at the American judicial system and walked off the playing field with the spurious claim that American courts never had any jurisdiction to consider Chabad's claims that Russia is illegally holding Chabad's property.

After proceedings that amply established the factual validity of Chabad's claims to both its "Archive" and its "Library," the district court entered an injunction ordering Russia to return Chabad's property that had been taken in violation of international law. It is undisputed that Russia deliberately disobeyed that order. The district court properly took the steps that any American court would routinely take if a party to litigation refused contumaciously to comply with a judicial command. The court entered an order imposing a monetary daily fine for future noncompliance.

Russia has continued for more than one year deliberately to disobey the district court's order. Chabad must now take meaningful steps to enforce the order and demonstrate to Russia that the American court process cannot be blithely ignored.

The rule of law that petitioner Argentina is seeking from this Court would effectively close off Chabad's most realistic and promising avenue for

securing compliance with the district court's order. After it terminated its participation in litigation with Chabad, Russia and the Russian governmentally controlled agencies that Chabad has sued may well have concealed assets that they held in the United States and removed from within the borders of the United States any property "used for a commercial activity in the United States." If – as petitioner Argentina contends in this Court – the FSIA bars plaintiffs who hold valid FSIA judgments from invoking traditional acceptable discovery procedures to find hitherto unidentified assets of a foreign state in the United States or in foreign countries, foreign sovereigns can readily evade orders to return property validly issued by district courts under the FSIA.

ARGUMENT

I.

THE FSIA CONTEMPLATES THAT DISTRICT COURTS WILL ISSUE ENFORCEABLE INJUNCTIONS DIRECTING FOREIGN STATES TO RETURN PROPERTY TAKEN IN VIOLATION OF INTERNATIONAL LAW

The FSIA authorizes lawsuits against foreign sovereigns by plaintiffs claiming "rights in property taken in violation of international law" if the property is located in the United States and, if the property is not "present in the United States," whenever "such property is owned or operated by an

agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Chabad established the statutory preconditions to the district court's jurisdiction over Chabad's claims to property that Russia is now holding within its own borders. See *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6 (D.D.C. 2006), *aff'd in relevant part*, 528 F.3d 934 (D.C. Cir. 2008).

A district court judgment enforcing a plaintiff's right to property held by a foreign state and located in that foreign state will, of necessity, include an order to the foreign state to return the property to the plaintiff. That was the form of the order sought and obtained by Chabad against Russia with regard to the Chabad "Library" and "Archive." Such an order against a non-governmental defendant is customarily enforced, if the defendant refuses to comply, with a contempt sanction imposing a financial penalty for future disobedience.

This Court held in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829 (1994), that "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order" is analogous to "coercive imprisonment" for contempt. The same principle applies to a contempt sanction imposed against a foreign state. If a district court order is to have "teeth" and if the dignity of the court issuing such an order is to be upheld, a fine for continued failure to comply with

the court order must be realistically collectible. See *Securities and Exchange Comm'n v. Bilzerian*, 613 F. Supp. 2d 66, 70 (D.D.C. 2009) ("Civil contempt, unlike the punitive remedy of criminal contempt, is designed to coerce compliance with a court order or to compensate a complainant for losses sustained.")

II.

THE PROSPECT THAT A DAILY CIVIL PENALTY FOR CONTEMPT WILL BE COLLECTIBLE IS ESSENTIAL FOR MEANINGFUL ENFORCEMENT OF MANDATORY INJUNCTIONS

The leading treatise on Federal Civil Procedure notes that "[a] court's ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2960 (2d ed. 1995). An early observation by this Court in *United States v. Hudson & Goodwin*, 7 Cranch 32, 34 (1812), was the following: "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . To fine for contempt – imprison for contumacy – enforce the observance of order, &c., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."

This was reaffirmed in *Ex Parte Robinson*, 86 U.S. 505, 510 (1873), with the observation that "[t]he

power to punish for contempt is inherent in all courts." The Court added, "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Id.* See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

Enforceability of injunctions by means of contempt was deemed in *Michaelson v. United States ex rel. Chicago*, 266 U.S. 42, 65 (1924), to be so "essential to the administration of justice" that it can be neither "abrogated nor rendered practically inoperative." The Court's opinion in *Michaelson* implied that Congress lacked power to limit a court's authority in "cases of failure or refusal to comply affirmatively with a decree – that is to do something which a decree commands – ***which may be enforced by coercive means*** or remedied by purely compensatory relief." 266 U.S. at 66 (emphasis added).

Congress has, to be sure, enacted procedural safeguards for contempt proceedings (*e.g.*, 18 U.S.C. § 401), but it has never sought to prevent the enforceability of judicially entered injunctions. The Court of Appeals for the District of Columbia Circuit has noted that "there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). And this Court has ensured that court orders, even if

ultimately vacated on plenary consideration, would be respected and obeyed. See *United States v. United Mine Workers of America*, 330 U.S. 258, 293-294 (1947).

It is highly improbable that Congress enacted provisions in the FSIA that granted enforceable rights to plaintiffs with claims to property held in foreign countries but deliberately withheld or restricted procedures and means by which judicial orders vindicating such claims could be enforced. Restricting ordinary discovery and barring disclosure of property of a foreign state that could potentially be attached in aid of execution would frequently have the effect of eviscerating a court order directing return of unlawfully held property.

III.

VICTIMS OF HOLOCAUST PROPERTY SEIZURES THAT VIOLATED INTERNATIONAL LAW WOULD BE DENIED JUDICIAL REMEDIES IF ARGENTINA'S CONTENTION IS SUSTAINED

Families of Jewish victims of the Holocaust whose valuable property, including artworks, was taken in violation of international law have pursued, and are currently pursuing, claims for return of such illegally seized property. See, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013); *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013); *Cassirer v.*

Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010); *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006); *Whiteman v. Dorotheum GMBH & CO KG*, 431 F.3d 57 (2d Cir. 2005); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012); *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.C. Cir. 2011); *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F.Supp.2d 689 (N.D. Ill. 2011).

District courts with jurisdiction under the FSIA may direct that these properties be returned. The plaintiffs will have to rely on the availability of civil contempt remedies to coerce compliance by recalcitrant foreign states or their agencies. The plaintiffs in such cases do not have the resources available to NML, the respondent in the case presently before this Court. They will have to discover assets held in the United States or abroad through comparatively less expensive available discovery. If, as petitioner Argentina contends and as the Seventh Circuit held in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012), discovery may only be utilized to assist in execution on previously identified assets, there is little realistic prospect that court orders resisted by foreign states will ever be implemented.

IV.

THE LANGUAGE OF THE FSIA DOES NOT SUPPORT ARGENTINA'S CONTENTION THAT DISCOVERY MAY NOT BE DIRECTED TO FINDING ASSETS LOCATED OUTSIDE THE UNITED STATES

In Argentina's Petition for Certiorari (pp. i, 22-26), and in its Brief on the Merits (pp. 32-39), as well as in the Government's *Amicus Curiae* Brief on the Merits (pp. 12-15), much emphasis is placed on the possibility that broad discovery will seek to find property owned by a foreign state that is located outside the United States. Argentina and the Government contend that the FSIA bars attachment and execution on a foreign state's property located abroad.

The "plain language" of the FSIA does not, however, support the broad immunity from discovery of foreign-located property that petitioner Argentina advocates.

First, no provision of the FSIA entitles individuals or entities located in the United States to refuse to comply with lawful subpoenas seeking discovery of information needed to enforce a court's judgment under the FSIA.

Second, Sections 1609, 1610(a), and 1610(b) define "property in the United States" that is "immune" and that "shall not be immune . . . from

attachment in aid of execution." By the well-established principle of *inclusio unius est exclusio alterius*, these provisions do not apply to property that is **not** "in the United States." Such property is beyond the scope of the FSIA. Whether a plaintiff with a judgment from a United States court may execute on property located outside the United States belonging to a foreign state will depend on the law of the jurisdiction where execution is sought. Hence discovery of property located in that jurisdiction is permissible under the discovery standards of Rule 69(a)(2) of the Federal Rules of Civil Procedure.

Section 1610(a)(3) also presupposes that a plaintiff seeking return of property located outside the United States may obtain execution of a judicial decree directing the return of such illegally seized property. That subsection authorizes execution of "a judgment establishing rights in property which has been taken in violation of international law" with no limitation relating to the current location of such property. Unlike the introductory language of Section 1610 – which declares that certain property "in the United States" is not immune from attachment in aid of execution – subsection (3) does not state that the property which is the subject of the judgment must be "in the United States."

Since subsection (3) authorizes execution of a "judgment establishing rights in property which has been taken in violation of international law" even if the taken property is located within the geographical

borders of the foreign state that is the defendant in the action, there must be some meaningful realistic means of achieving execution of such a judgment. A plaintiff holding a civil contempt judgment that imposes a penalty on a foreign state for its contumacious refusal to comply with a mandatory injunction should surely be permitted to seek, through routine discovery, assets that might be seized to coerce compliance with the court's order.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* AURELIUS ENTITIES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici, referred to below as the "Aurelius Entities," comprise Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC.[1] Like respondent NML, *amici* are holders of defaulted Argentine bonds and—based on Argentina's express waiver of sovereign immunity and submission to the jurisdiction of U.S. courts and to U.S. law—sued Argentina in the Southern District of New York for breaching its contractual obligations. And, like respondent NML, *amici* have sought discovery from Argentina regarding its assets. See *NML Capital, Ltd.* v. *Republic of Argentina*, No. 13-4054(L) (2d Cir. appeal docketed Oct. 25, 2013). *Amici* therefore have a direct and substantial interest in U.S. courts' authority to order discovery and other appropriate relief against sovereigns that, to attract investment in their public debt, have expressly submitted to the jurisdiction of U.S. courts.

This brief responds to the *amicus* brief filed by the United States in support of petitioner. The United States has opposed respondent and *amici* in Argentina-related litigation, urging the courts to depart from the text of the Foreign Sovereign Im-

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief by letter, which was filed herewith. Respondent's blanket letter of consent to the filing of *amicus* briefs has been filed with the Court.

munities Act (FSIA). The United States has suggested that courts should base their decisions on supposed intentions behind the FSIA rather than the text Congress enacted, and has backed its arguments with vague suggestions that the foreign policy of the United States will suffer if the courts do not follow the United States' recommendations. The *amicus* brief filed by the Solicitor General in this case is of that ilk.

This Court should take this opportunity to confirm that, when enacting the FSIA, Congress meant what it said and said what it meant. That holding would respect the clear rules and careful balance among the Branches that the FSIA brought to sovereign immunity law. Contrary to the largely unexplained assertions made by the United States, affirming the court of appeals would not imperil the Nation's foreign relations. Indeed, reaffirming that courts enforce our laws according to their plain meaning—even in cases where one Branch of the government may prefer a different result—is a hallmark of the American legal system and the foundation of our Nation's stature in the international community.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a statutory interpretation case. As this Court has "stated time and again," "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). The FSIA makes no mention of prohibiting postjudgment discovery against sovereigns

who have submitted to the jurisdiction of U.S. courts. Nor does the statute purport to imbue sovereign property with categorical "immunity" or to prohibit any judicial action related to it, other than certain actions specifically prohibited by statute. Rather than speak in the categorical terms the United States attributes to it, the statute simply declares, in relevant part, that "the property in the United States of a foreign state shall be immune from attachment arrest and execution" by U.S. courts. 28 U.S.C. § 1609.

The United States seeks to transform that specific statutory restriction into blanket immunity from any judicial action that *concerns* sovereign property that is not itself subject to attachment, arrest, or execution. To that end, the United States points to "costs and burdens" and "foreign-relations concerns" it says will result from complying with the district court's discovery orders. U.S. Br. 9, 11. But, even if those were real worries here (they are not)—and even if the United States' concerns about such matters warranted deference (they do not)—they could not overcome the established tools of statutory interpretation. The FSIA's text, purpose, and history all demonstrate that "attachment arrest and execution" means "attachment, arrest, and execution," not "discovery."

The FSIA recognizes two immunities, which operate independently of one another: an immunity from jurisdiction, and an immunity from "attachment arrest and execution" of sovereign property. The former is not at issue here, since Argentina explicitly waived it and therefore voluntarily subjected itself to the full powers of the U.S. courts. If

either immunity applies in this case, therefore, it would be the immunity from "attachment arrest and execution." But, by its terms, that immunity does not encompass discovery of any stripe. Indeed, discovery is a power that accompanies a court's jurisdiction over a party, not its authority to attach or execute against property. The absence of "postjudgment discovery" from the list of immunities was no accident: Congress thought about discovery but did not include it in the FSIA's list of prohibitions.

The FSIA's purposes confirm what its text says. One purpose of the immunity from *jurisdiction* is to spare sovereigns the burdens of litigation. But that concern has no application when a sovereign is already subject to jurisdiction. That concern is especially inapplicable when the basis of jurisdiction is the sovereign's consent, and the consent was given to reassure investors that they could count on the sovereign to keep its promises and would have remedies if the sovereign did not keep its promises.

The FSIA's other purposes—among them, codifying the "restrictive theory" of immunity and replacing executive determinations with legislative rules—are in harmony with postjudgment discovery orders. Congress sought to replace the murky common-law system with clear legislative rules. And it replaced the common-law prohibition on enforcement against sovereigns with a mechanism for *satisfying* judgments, except in the specific ways—*e.g.*, "attachment arrest and execution" with respect to certain property—prohibited by the text. Erecting a barrier to asset discovery, which Congress did not prohibit,

would frustrate, not advance, those statutory objectives.

The United States' asserted foreign-relations concerns do not compel a different result in this case. Such concerns are entitled to no special deference in a statutory-interpretation case, even when the statute at issue is the FSIA. That aside, any such considerations here are minimal. Reciprocal treatment is uncommon in modern immunity law, and it is unlikely to arise given the exceptional facts of this case. Nor is comity implicated, as the discovery order here is fully consistent with international law. More important, such concerns cannot change the plain meaning of the FSIA's text. To be sure, there are special rules for sovereigns. But they are the ones set forth by Congress *in the FSIA*—there are no special rules *of statutory interpretation* entitling sovereign litigants to claim statutory immunities that the FSIA does not actually confer.

ARGUMENT

I. THE IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION" DOES NOT CONSTRAIN DISCOVERY

The United States contends that the FSIA limits postjudgment discovery from sovereigns. That is so, it maintains, even when courts have consent-based jurisdiction over the sovereign, which empowers courts to order such discovery.

For four reasons, the United States is incorrect. First, the text of the FSIA suggests no such limitation. Second, the purpose (or "nature") of the FSIA

supports limiting only the forms of enforcement enumerated in the statute—not discovery—against a sovereign that has been sued in its commercial capacity and has consented to jurisdiction. Third, the context in which the FSIA was enacted confirms that Congress meant to move away from uncertain common law and toward clear legislative rules set forth in the statute's text. Fourth, the discovery order presents no material reciprocity or comity concerns.

A. The Text Of The FSIA Does Not Support The Rule That The United States Proposes

When construing the FSIA, this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007). The text of the statute does not bear the meaning that the United States ascribes to it.

1. At its core, the FSIA consists of two distinct immunities. First, it provides that foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States" with certain exceptions. 28 U.S.C. § 1604. Second, it provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution" with certain different exceptions. *Id.* § 1609. These two immunities and their exceptions operate independently of one another. *E.g.*, *Walters* v. *Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

One result of the FSIA's distinct immunities is that courts might be able to issue judgments against sovereigns but not "attach[] arrest [or] execut[e]" on their property. See *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984). That is because the exceptions to jurisdictional immunity, 28 U.S.C. §§ 1605-1607, are different from the exceptions to "attachment arrest and execution" immunity, *id.* §§ 1610-1611. For this reason, it is "not anomalous" to separate "a court's power to impose" orders on a sovereign—which follows from its jurisdiction—from "the question of a court's ability to enforce" those orders through attachment, arrest, or execution. *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). The immunities are distinct; courts may issue orders that they lack the power to enforce through certain prohibited mechanisms. Accord U.S. Br. 12-13. On this much, the parties here are in agreement.

The question presented here, however, is whether the FSIA's immunity from "attachment arrest and execution" against property in the United States bars the discovery order. Argentina contends that, because this immunity shields some of its property in the United States from execution, the district court's authority to order discovery must be sharply limited. Arg. Br. 2. The court of appeals disagreed. It reasoned that the district court had jurisdiction because Argentina had expressly waived the FSIA's jurisdictional immunity. Pet. App. 18. And the jurisdiction of the federal courts empowers them to enter postjudgment discovery orders. Pet. App. 16, 18. The second immunity, from "attachment arrest and execution," did not constrain the order, which "or-

dered only discovery, not the attachment of sovereign property." Pet. App. 3.

2. It is undisputed that Argentina waived its immunity from suit as an inducement to investors who purchased its debt and therefore is "not . . . immune from the jurisdiction of courts of the United States." 28 U.S.C. § 1605(a); see Pet. App. 4. Argentina is thus subject to the full scope of the federal courts' authority, unless another provision of the FSIA specifically precludes its exercise. The federal courts' jurisdiction includes the power to issue post-judgment discovery orders like the order at issue here. The United States contends that the FSIA's prohibition on "attachment arrest and execution" against property in the United States also prohibits federal courts from ordering discovery regarding any sovereign property that does not fall within one of the limited exceptions to the "attachment arrest and execution" immunity. The United States is wrong.

The "jurisdiction of courts of the United States" comprises a broad array of powers. Encompassed within these powers are the powers enumerated in the Federal Rules of Civil Procedure. See *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.") (citing Fed. R. Civ. P. 82). Hence, a district court's exercise of a power enumerated in the Federal Rules derives from its jurisdiction over the case before it. Exercise of such a power does not require some separate source of authority, such as the authority to order execution against property.

The power to order postjudgment discovery from a litigant over which a court has jurisdiction is one of these powers. See Fed. R. Civ. P. 69(a)(2) ("[T]he judgment creditor . . . may obtain discovery . . . as provided in these rules or by the procedure of the state where the court is located."); Pet. App. 16. And it is beside the point that such discovery might lead abroad: "A court or agency in the United States, when authorized by statute or rule of court, may order a person *subject to its jurisdiction* to produce documents . . . relevant to an action or investigation, *even if* the information or the person in possession of the information is outside the United States." Restatement (Third) of Foreign Relations Law of the United States, § 442(1)(a) (1987) (emphases added); see also *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1478 (9th Cir. 1992) (affirming a postjudgment discovery order against an instrumentality of a foreign sovereign).

The United States asserts that, although the district court had "jurisdiction to conduct" these proceedings, it was not "empowered to afford" the relief it did. Br. 30. But observing that the FSIA limits the "scope of relief" that a court may grant simply begs the question whether the FSIA prohibits a particular form of relief—*i.e.*, postjudgment discovery. The courts below have "afford[ed]" no "relief" that the FSIA prohibits.

Relatedly, the United States asserts that, because jurisdiction under the FSIA is a matter of legislative grace, it should be narrowly construed. U.S. Br. 18. In that respect, however, the lower courts' jurisdiction under the FSIA is no different than any other sort of jurisdiction. *Kline* v. *Burke Constr. Co.*, 260

U.S. 226, 234 (1922) ("Every [lower] court . . . derives its jurisdiction wholly from the authority of Congress."). And the federal courts have a "virtually unflagging" obligation to exercise the jurisdiction granted them. *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (quotation marks omitted). Moreover, Congress did not suggest that it was conferring half-a-loaf jurisdiction. To the contrary, it provided that, where (as here) an exception applies, foreign sovereigns lack immunity from "the jurisdiction of courts of the United States"—period. 28 U.S.C. § 1605(a); see *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009) ("[I]f any of these [FSIA exceptions] is applicable, the state is subject to suit, and federal district courts have jurisdiction to adjudicate the claim.").

Both of these assertions rest on the United States' conclusory claim that "Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment." U.S. Br. 18, 30. But one will search the FSIA's text in vain for such a categorical prohibition. To the contrary, that "independent entitlement" is an immunity only from "attachment arrest and execution." 28 U.S.C. § 1609. Had Congress intended that immunity to apply to any proceedings "in connection with" these remedies, it would have said so. See, *e.g.*, *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058 (2014) (construing statutory phrase "in connection with"). It did not.

3. The discovery order does not amount to attachment arrest [or] execution." As the FSIA does not define "attachment," "arrest," or "execution," the Court should "adopt the common law definition of

[those] statutory terms." *Whitfield* v. *United States*, 543 U.S. 209, 213 (2005) (quotation marks omitted). None of these meanings covers the discovery order here. For example, the edition of Black's Law Dictionary that was current when the FSIA was enacted defines "attachment" as "[t]he act or process of taking, apprehending, or seizing persons or property . . . for the purpose of bringing a person before the court, [or] of acquiring jurisdiction over the property seized." Black's Law Dictionary 161 (4th ed. 1951). Likewise, it defines "execution of judgment or decree" as "putting into effect of final judgment of court." *Id.* at 678.[2] The common thread running through these definitions is the seizure of a property interest. The discovery order in this case effects no seizure.

Conspicuously absent from Section 1609 is a ban on "discovery in aid of enforcement" or anything like it. That absence is particularly telling because the legislative history shows that Congress thought about discovery but elected not to include it in the list of prohibited actions. See *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) ("[T]he *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." (quotation marks omitted)). The House Report states, "The bill does not attempt to deal with questions of discovery." H.R. Rep. No. 94-1487 at 23 (1976) ("House Report"). Rather, the Report indicates that "[e]xisting law appears to be adequate in this area. For example, if

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[2] Elsewhere in the FSIA, Congress used "arrest" in the context of maritime law. See 28 U.S.C. §§ 1605(b)(1), 1610(e).

a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply." *Ibid.* Notably, these comments appear in the discussion of jurisdictional immunity, confirming that discovery follows jurisdiction, not the power to enforce.

The United States' sole response to this legislative history is to insist that Congress could not have meant to embrace the full gamut of existing discovery law. U.S. Br. 23. But the House Report suggests that Congress did just that, even after considering the ways in which discovery could present foreign-relations issues.

Reading "attachment arrest and execution" to mean "discovery" is a bridge too far, and this Court has refused to take much shorter leaps when interpreting the FSIA. *Dole Food Co.* v. *Patrickson*, for instance, concerned the meaning of "'shares or other ownership interest . . . owned by a foreign state.'" 538 U.S. 468, 473 (2003) (quoting 28 U.S.C. § 1603(b)(2)). An indirect subsidiary of the government of Israel argued that Israel effectively "owned" the subsidiary for FSIA purposes. *Ibid.* This Court disagreed, holding that "ownership" means direct ownership: "Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so." *Id.* at 476. That distinction, arguably, was one "purely of form, not of substance." *Id.* at 485 (Breyer, J., concurring in part and dissenting in part). The distinction between enforcement and discovery, on the other hand, is fundamental—enforcement seeks satisfaction of the judgment and operates directly against property; discovery operates against persons and seeks information. Discov-

ery may seek information *about* property, but any steps taken against the property will come only after discovery. Unlike attachment, arrest, or execution, discovery does not operate on the property itself. Congress made a clear distinction between enforcement and discovery, and this Court should give that distinction effect.

B. The Discovery Order Is Consistent With The Purpose And "Nature" Of The FSIA

The principal focus of the United States' argument is not the FSIA's text but the "nature of immunity" it posits the statute (implicitly) confers. Br. 15; see Br. 15-20. The "nature" the United States sees in immunity, however, is peculiar to jurisdictional immunity, which Argentina does not have here. It has nothing to do with the separate "attachment arrest and execution" immunity at issue. And it ignores the broader purposes of the FSIA that undergird both of those immunities (which Argentina waived).

1. The United States claims that the "nature of immunity" requires "'foreign states and their instrumentalities'" to have "'some protection from the inconvenience of suit.'" Br. 15 (quoting *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008)). It continues that discovery orders like the one in this case "could impose significant burdens on the foreign state." Br. 19. Thus, the United States contends, the FSIA does not tolerate such discovery orders.

That argument is misplaced for two reasons. First, the order in this case is directed at third-party

banks, not at Argentina. Pet. App. 5. It therefore would spare Argentina the heavy lifting of discovery.

Second, and more fundamentally, it is *jurisdictional* immunity that serves to protect sovereigns from the inconvenience of suit. The cases on which the United States relies generally concern whether a sovereign is amenable to suit to begin with. *E.g.*, *Pimentel*, 553 U.S. at 865; *Hansen* v. *PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063-64 (10th Cir. 2010); *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).[3] Where jurisdictional immunity might apply, it is unclear whether the courts may ask sovereigns to lift a finger. By compelling discovery, courts would demand the kind of action that jurisdictional immunity might otherwise prevent.

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[3] Some courts, including the Second Circuit, have limited discovery after assuming jurisdiction. *E.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007); *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002). Except for the Seventh Circuit, however, those courts have not grounded those holdings on the FSIA. See Resp. Br. 31-32. Rather, district courts account for any foreign-relations concerns when they exercise their discretion over discovery. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987). And the district court has done that here. Opinion, *NML Capital, Ltd.* v. *Republic of Argentina*, Dkt. No. 535 (S.D.N.Y. Feb. 8, 2013). The district court thus is not "proceed[ing] as though only private interests [a]re implicated." But see U.S. Br. 15.

The same is not true, however, of immunity from "attachment arrest and execution." Once a court has jurisdiction over a sovereign, it may order it to appear in court, respond to pleadings, and provide discovery—all of which may impose significant "inconvenience" on sovereigns. And a court may impose contempt sanctions should the sovereign fail to comply. *FG Hemisphere*, 637 F.3d at 379. Attachment, arrest, and execution might be unavailable, but that does not affect the court's power to issue orders to a sovereign over which it has jurisdiction.

The United States' analogy to qualified immunity, Br. 15, 16-17, confirms this point. Qualified immunity, like jurisdictional immunity under the FSIA, is an "immunity from suit." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 809 (1982). Once a court determines that this immunity does not apply, however, it may subject the defendant to the full rigors of jurisdiction. *E.g.*, *LeClair* v. *Hart*, 800 F.2d 692, 697 (7th Cir. 1986). That an immunity might have applied at the outset does not cast a shadow over the rest of the proceedings.[4]

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[4] Even when the interest in avoiding the burdens of litigation is relevant—as it is in a qualified-immunity case, and in an FSIA case in which jurisdiction is doubtful, but not here, where jurisdiction is established—this Court will not allow it to trump other important considerations. For example, in *Johnson* v. *Jones*, 515 U.S. 304 (1995), the United States as *amicus curiae* argued that the "'the need to protect officials against the burdens of further pretrial proceedings and trial' justifies a relaxation of the" requirement that issues be separable from the merits to justify an interlocutory appeal. *Id.* at 315 (quoting

When one considers why U.S. courts have jurisdiction over Argentina, it becomes even clearer why it would make no sense to hold that some residuum of immunity from the inconveniences and burdens of litigation remains. Argentina waived sovereign immunity, "irrevocably" and "to the fullest extent permitted by the law[]." Pet. App. 4 n.1. It did so for the purpose of making its bonds as attractive as possible to potential investors. The concept that a residuum of the FSIA's immunity *from suit* restricts the litigation rights of those investors is directly contrary to the instrument that induced them to do business with Argentina, is unsupported in the text of the FSIA, and constitutes the worst kind of bait-and-switch by the sovereign debtor. Argentina promised the broadest permissible waiver of immunity when doing so served its interest to attract investment, but now seeks to use the fully waived immunity as support for a broad construction of the separate statutory provisions governing enforcement of judgments. The Court should reject that effort. Argentina's claim of immunity from discovery must stand or fall entirely based on the FSIA's immunity from "attachment arrest and execution."

2. The FSIA's "attachment arrest and execution" immunity, the only one that could apply here, protects interests different from those protected by the (waived) immunity from suit. None is affected here.

Wright, Miller & Cooper, Federal Practice and Procedure § 3914.10, at 656 (1992)). This Court unanimously disagreed.

First, the "attachment arrest and execution" immunity guards sovereigns from the indignity of seizure by a U.S. court of their property within the United States. A "judicial seizure," this Court has explained, "may be regarded as an affront to [a sovereign's] dignity and may . . . affect our relations with it." *Pimentel*, 553 U.S. at 866 (second alteration in original) (quotation marks omitted); see U.S. Br. 14 (collecting citations). And that indignity is quite specific. Not only was it limited to the seizure of property; it was limited to the seizure of property in the possession of the foreign state. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 37-38 (1945). If a sovereign held title to property, but did not possess it, that property was fair game. *Ibid.* A court order that merely concerns, but does not take, sovereign property is another step removed from the indignity that Section 1609 guards against. In particular, a discovery order operates *in personam* (and, in this case, only against banks). It is not the same as an *in rem* remedy like a judicial seizure of property.

Second, the FSIA restricts attachments and arrests to prevent courts from securing *quasi in rem* jurisdiction over foreign sovereigns that could not otherwise be sued here. Congress was concerned that "the fortuitous presence of property in the jurisdiction" was "involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts." House Report 26. Attachments of property that created jurisdiction were "giv[ing] rise to serious friction in United States[] foreign relations." *Id.* at 27.

The discovery order at issue implicates neither of those protections for sovereigns.[5] It does not seize any Argentine property. Nor does it create jurisdiction that otherwise would be lacking; Argentina sold its bonds and consented to suit in the United States.

3. The United States' "nature" argument is, fundamentally, an argument about the FSIA's purpose. Cf. Aristotle, Physics, Book 2, Part 8 ("[N]ature is a cause, a cause that operates for a purpose."). By focusing narrowly on one purpose of one (inapplicable) FSIA immunity, however, the United States overlooks the purposes that animate the statute as a whole.

Congress expressly declared the purposes of the FSIA. 28 U.S.C. § 1602. Those purposes, as this Court has summarized them, are "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010) (quoting 28 U.S.C. § 1602). Those purposes are fully consistent with the discovery order in this case.

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[5] The United States asserts that "a primary purpose *of execution immunity* is to protect against the burdens of litigation." U.S. Br. 11 (emphasis added). Yet its brief offers no substantial support for that proposition. The United States cites cases that state, correctly, that a primary purpose of *jurisdictional* immunity is such protection, and elides the major distinction between jurisdictional and execution immunity, even after touting that distinction elsewhere in its brief.

First, the discovery order comports with the "restrictive theory" of sovereign immunity. The "restrictive theory" was in 1976, and is today, followed by "the majority of other countries." *Permanent Mission of India*, 551 U.S. at 199. Under that theory, "'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Ibid.* (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711 (1976)). The restrictive theory, in other words, "confine[s]" immunity "to suits involving the foreign sovereign's public acts." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). Suits involving the sovereign's "strictly commercial acts" generally are not covered. *Ibid.*; see 28 U.S.C. §§ 1605(a)(2), 1610(a)(2) (establishing exceptions for commercial activities).

Consistent with the restrictive theory, the discovery order is related to Argentina's commercial acts, not its sovereign acts. It is rooted in NML's efforts to collect on bonds that Argentina promised to pay in U.S. dollars in New York City. Argentina, therefore, is wearing a decidedly commercial hat, not a sovereign one. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992) (holding that Argentina's issuance of such bonds is a commercial act). And, though the discovery order is directed at what Argentina calls sovereign property, it is calculated to lead to discovery of attachable property. See part II, *infra*.

Second, the discovery order infringes no immunity recognized by the courts. The Executive Branch opposes the discovery order issued here, but a "principal purpose" of the FSIA was "to transfer the determination of sovereign immunity from the

executive branch to the judicial branch." House Report 7. That transfer aimed to "assur[e] litigants" that immunity determinations "are made on purely legal grounds." *Ibid.* Applying established canons of statutory interpretation to the FSIA reveals no infirmity in the discovery order. See section I.A, *supra*.

C. The Backdrop Against Which Congress Legislated Undermines The United States' Proffered Approach

The United States reminds us that "[i]t is important to keep in mind the backdrop against which Congress legislated." Br. 22. We could not agree more. Congress enacted the FSIA against a backdrop of uncertainty and disarray, and it sought to institute clear legislative rules in their stead. Adopting the atextual gloss that the United States encourages here would be a large step *away* from that objective. Likewise, restricting discovery in aid of enforcement would frustrate Congress's goal of moving away from the common law.

1. For most of the Nation's history, there was no need for Congress to draw a clear line on foreign sovereign immunity, because there was generally little question about whether immunity did or did not apply. Shortly after the Founding, this Court held that sovereigns were "in no respect amenable to [one] another." *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The Executive Branch consistently determined that friendly sovereigns were absolutely immune, and the courts deferred to those determinations. See *Verlinden*, 461 U.S. at 486-87.

That changed in 1952, when the Executive Branch adopted the "restrictive theory"—and thereby "thr[e]w immunity determinations into some disarray." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). In the years that followed, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Verlinden*, 461 U.S. at 488. As a result, "the governing standards were neither clear nor uniformly applied." *Ibid.* The resulting mess pleased no one. It put the Executive Branch "in the awkward position of a political institution trying to apply a legal standard." House Report 8. And it left litigants facing "considerable uncertainty." *Id.* at 9.

"In 1976 Congress sought to remedy these problems by enacting the FSIA, a comprehensive statute containing a set of legal standards." *Altmann*, 541 U.S. at 691 (quotation marks omitted). The FSIA operates like any other civil procedure statute. It "grants federal courts jurisdiction" in certain cases, *ibid.*, "contains venue and removal provisions," *ibid.*, and "prescribes the procedures for obtaining personal jurisdiction," *ibid.* And, as with any other civil procedure statute, Congress expected the "courts of the United States" to "decide[]" questions arising under the statute, 28 U.S.C. § 1602, on "purely legal grounds," House Report 7.

The United States would have this Court retreat from the plain words of the statute to "principles" supposedly emanating from textual penumbras. *E.g.*, U.S. Br. 10, 12, 24. It "hardly furthers Congress' purpose of clarifying the rules," however, to "lump" discovery "in with" attachment, arrest, and

execution "without so much as a word spelling out" the contours of this new rule. *Samantar*, 130 S. Ct. at 2291 (quotation marks omitted). In enacting the FSIA, Congress sought to avoid "ambiguous and politically charged 'standards.'" *Altmann*, 541 U.S. at 699 (citation omitted). This Court, mindful of the context of the FSIA's enactment, should stay that course.

2. The backdrop that the United States deems relevant is a common-law rule of "absolute immunity from execution," which "necessarily did not contemplate discovery into a foreign state's assets." U.S. Br. 22. That background is irrelevant at best; if anything, it contradicts the position of the United States.

The "canon of construction that statutes should be interpreted consistently with the common law . . . does not help us to decide the antecedent question whether . . . Congress intended the statute to govern a particular field." *Samantar*, 130 S. Ct. 2289-90. As discussed above, the FSIA did not "attempt to deal with questions of discovery." House Report 23. Any common-law rules limiting discovery from sovereigns, therefore, shed little light on the FSIA.

To the extent that pre-FSIA common law is relevant, it shows that Congress meant to allow discovery in this context. This Court construes statutes to displace the common law "when a statutory purpose . . . contrary" to the common law "is evident." *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (quotation marks omitted). The FSIA evinces such a purpose. Whereas the common law provided comprehensive immunity from execution, the FSIA established significant exceptions to that immunity,

displacing the common-law rule. See 28 U.S.C. §§ 1610-1611; House Report 8 ("[T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state."); Testimony of State Department Acting Legal Adviser Charles Brower, Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong., 1st Sess. 15 (1973) ("[I]f you are able to gain jurisdiction and obtain a judgment you would have a reasonable chance of obtaining satisfaction of judgment.").[6]

Permitting postjudgment discovery is consonant with Congress's goal of affording plaintiffs some relief. As the United States recognizes, "[a] judgment creditor bears the burden of identifying the

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[6] Acting Legal Adviser Brower's statement to a congressional committee considering the legislation that became the FSIA is more probative of Congress's intent than the statement in some case law that "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010), quoted in U.S. Br. 13. In any event, the creation of rights without remedies is an unfortunate byproduct of the FSIA's provisions in certain circumstances rather than an animating purpose of the statute, and there is no reason to construe the FSIA to create rights without remedies except when its text, purpose, and history so dictate. The creation of rights without remedies is particularly to be avoided when a foreign sovereign waived its immunity to the fullest extent permitted by law, for the very purpose of inducing investment in its debt instruments by promising that there *would* be remedies unless prohibited by law.

particular property to be executed against and proving that it falls within a statutory exception to immunity from execution." Br. 14. In this context as in any other, discovery is the main way creditors may seek to meet that burden. And discovery is just as significant, if not more so, for assets located abroad. See Resp. Br. 44-46; *Richmark*, 959 F.2d at 1478 ("TFC can seek to execute the judgment in whatever foreign courts have jurisdiction over Beijing's assets, but TFC needs discovery in order to determine which courts those are." (citation omitted)).

Any common-law limitations on discovery were a mere byproduct of the virtually absolute immunity it provided. See U.S. Br. 22. Having eliminated that immunity, Congress did not silently retain its by-product.

D. The United States' Concerns About Foreign Policy Consequences Are Not Justified

Although the FSIA's text, purpose, and history warrant affirming the court of appeals, the United States warns that doing so "could disrupt foreign policy." Br. 10. Its views on potential consequences, however, warrant no special deference. Apart from that, its views are unfounded. The discovery order here exposes the United States to no material reciprocal harm, and, since it is consistent with international law, it presents no comity concerns.

1. The views of the United States are no more persuasive here than they are in other statutory interpretation cases. The question presented "con-

cerns interpretation of the FSIA's reach—a 'pure question of statutory construction . . . well within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). Hence, although "the United States' views on such an issue are of considerable interest," they "merit no special deference." *Ibid.* In particular, the Court has found unpersuasive claims that "foreign relations and the reciprocal protection of United States officials abroad would be undermined if we do not adopt [the petitioner's] reading of the [FSIA]." *Samantar*, 130 S. Ct. at 2290 n.14; see also *W.S. Kirkpatrick & Co.* v. *Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 408-09 (1990) (rejecting United States' argument that "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations" required expanding act-of-state doctrine "into new and uncharted fields"). Such "broad, generic argument[s]" are "appropriately presented to Congress—not [the courts]." *FG Hemisphere*, 637 F.3d at 380.

The United States cannot change those holdings by imputing its reasoning to Congress. See U.S. Br. 23. As in every case, the question "is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618. That is especially true where, as here, Congress directed that the "courts of the United States," not the Executive Branch, shall "decide[]" "[c]laims of foreign states to immunity." 28 U.S.C. § 1602.

2. The United States expresses concern that "broad discovery could lead to reciprocal adverse treatment of the United States in foreign courts."

Br. 20. But that is misdirection. It is an abstract, generalized concern, not an opinion about the effects of imposing orders on "*particular* petitioners," which might warrant some consideration. See *Altmann*, 541 U.S. at 702. Indeed, the particular petitioner here is a "rogue debtor" whose acts the United States itself "strongly" condemns—hardly a basis for reciprocity concerns. See U.S. Br. 6 n.2; Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311 (2005). And, in expressing this concern, the United States "does not explain how [it] would be harmed if it were found in contempt under reciprocal circumstances." See *FG Hemisphere*, 637 F.3d at 380 (rejecting similar argument).

Compelling discovery in this particular case would do little to harm the United States as a litigant abroad. "[I]n practice," one commentator has observed, "very few courts have expressly referred to [reciprocity] as the basis for immunity." Xiaodong Yang, State Immunity in International Law 57 (2012). Indeed, "there are even statements dismissing it as having any bearing on the question of immunity." *Ibid.* Accordingly, holding that Argentina lacks immunity here is unlikely to subject the United States to the same treatment in foreign courts.

Moreover, any threat posed in this case is unlikely to extend beyond this Nation's relationship with Argentina, which Argentina has already damaged. The foreign statutes that recognize reciprocity, see U.S. Br. 21 n.9, provide that it applies only if the executives of those nations say so. *E.g.*, Foreign States Immunities Act 1985 s. 42(1) (Austl.); State

Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Can.); State Immunity Act, 1985, s. 17 (Sing.); State Immunity Act, 1978, c. 33, § 15 (U.K.). Thus, foreign executives must choose to subject the United States to reciprocal treatment. And reciprocity applies, if at all, only on a nation-by-nation basis. See *ibid.* Thus, the United Kingdom (for example) would not retaliate unless a U.S. court entered a broad discovery order against it—which is unlikely, as other friendly sovereigns are unlikely to echo Argentina's behavior. There is no reason to believe that reciprocity in this case would extend beyond Argentina, whose actions have already strained this Nation's relationship with it. See Presidential Proclamation No. 8788, 77 Fed. Reg. 18,899, 18,899 (Mar. 26, 2012) (withholding benefits from Argentina because it "has not acted in good faith in enforcing arbitral awards in favor of United States citizens").

Finally, the United States' reciprocity argument proves too much. If it applies to postjudgment discovery, as the United States contends, it has every reason to apply also to prejudgment discovery, which is no narrower in scope. Yet courts routinely order prejudgment discovery from sovereigns over which they have jurisdiction. *E.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346, 349 (D.C. Cir. 1995); *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). And the United States does not contend that this established practice flouts the FSIA. Consequently, striking down the discovery order here on reciprocity grounds would upend the law elsewhere.

3. The United States also claims that the discovery order at issue "threaten[s] harm to the United

States' foreign relations more generally." Br. 21; see also Br. 9, 10, 13, 19 (citing "comity" concerns). That perceived harm is even more remote than the potential harm of reciprocity. See U.S. Br. 21 ("likely to breed resentment"); *ibid.* ("a perception of unequal treatment could arise"); Br. 22 ("may result over the long term in reduced cooperation"). At any rate, there is no ground for concern, as the discovery order here is consistent with international law.

The United States' concerns would, at most, call for the Court to harmonize the FSIA with international law. The "comity of nations" fixes no concrete rule of decision. See *Hilton* v. *Guyot*, 159 U.S. 113, 165 (1895) ("'[Comity] is clearly [an] imperfect obligation . . . . Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.'" (quoting Joseph Story, Commentaries on the Conflict of Laws § 33)). The only tenet of comity that has any bearing here is the maxim that courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Such "interference" exists, however, only if the challenged construction of the FSIA "violate[s] the law of nations." See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In enacting the FSIA, Congress sought to "codif[y] international law at the time of the FSIA's enactment." *Permanent Mission of India*, 551 U.S. at 199. It succeeded. Although immunity statutes vary, "many" provisions of the United Nations Convention on Jurisdictional Immunities of States and Their

Property "reflect accepted international principles and practices" in this area. U.S. Br. 28 n.12.[7] This U.N. Convention mirrors the FSIA in relevant part. It establishes separate immunities from "jurisdiction" and from "measures of constraint, such as attachment, arrest, or execution." G.A. Res. 59/38, arts. 5, 19, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("U.N. Convention"). And, like the FSIA, it does not indicate that the latter immunity affects discovery.

Indeed, international law supports the discovery order here. The U.N. Convention contemplates that sovereign defendants might "fail[] . . . to produce any document or disclose any other information for the purposes of a proceeding." Art. 24(1). In other words, it expressly contemplates discovery. And it sets no boundaries on that discovery, whether before or after judgment. As with the FSIA, the drafters expected other law, such as government-secrets privileges, to provide any necessary boundaries. Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29-July 19, 1991, U.N. Doc. A/46/10, at 150-51; GAOR, 46th Sess., Supp. No. 10 (1991) ("States, for reasons of

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[7] The Solicitor General acknowledges that the United States is not a party to the Convention and that it has not yet entered force. U.S. Br. 28 n.12. To the extent any provision of the Convention might be inconsistent with the FSIA, therefore, it is the FSIA that must govern. But in key part the Convention's provisions *reaffirm* the consistency of the FSIA with international law, including the propriety of sharply distinguishing, as the FSIA does, between jurisdictional immunity and enforcement immunity. By eliding that distinction at various places in its brief, and by ignoring the Convention's provisions contemplating discovery, the United States takes a position supported by neither the FSIA nor the Convention.

security or their own domestic law, may sometimes be prevented from submitting certain documents or disclosing certain information to a court of another State.").

In sum, the discovery order is consonant with international law and so would cause no "perceived affronts." But see U.S. Br. 21. Foreign sovereigns cannot question the United States' claim to a power that they themselves possess.

II. THE DISCOVERY ORDER RESPECTS THE FSIA'S IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION"

The breadth of the discovery order does not offend the FSIA and related laws. That order does not "attach[]," "arrest," or "execut[e]" upon any property. See 28 U.S.C. § 1609. Specifically, it does not seize property abroad, central bank property (*id.* § 1611(b)(1)), military property (*id.* § 1611(b)(2)), diplomatic or consular property (*id.* § 1610(a)(4)(B)), or the property of a separate entity (*First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)). It orders only discovery.

The discovery order relates to some assets that might be immune from enforcement in the United States, but that does not render it invalid. Plaintiffs who have obtained judgments "may obtain discovery from any person—including the judgment debtor—as provided" by the Federal Rules of Civil Procedure or applicable state law. Fed. R. Civ. P. 69(a)(2). Those rules limit discovery to "all information 'reasonably calculated to lead to the discovery of admissible evidence' relevant to enforcement of the judgment."

E.I. DuPont de Nemours & Co. v. *Kolon Indus., Inc.*, 286 F.R.D. 288, 292 (E.D. Va. 2012) (quoting Fed. R. Civ. P. 26(b)(1)); accord, *e.g.*, *Libaire* v. *Kaplan*, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011).

Applying these rules, the discovery order here is permissible because it is reasonably calculated to lead to discovery of Argentine assets that are not immune. Orders like the one in this case might seem unnecessary to discover the nonimmune assets of an ordinary litigant. But Argentina is no ordinary litigant. It has announced in open court that it will "not voluntarily obey" court orders. *NML Capital, Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013). In fashioning the discovery order, the district court accounted for the lengths to which Argentina has gone to hide its assets. See, *e.g.*, *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 280 (S.D.N.Y. 2010) ("When the Republic wishes to use the funds of a particular entity, there is no real separation . . . . But when plaintiffs in these cases are seeking to recover on their just judgment debts, the situation shifts and a wall of separation suddenly appears."), vacated on other grounds, 652 F.3d 172 (2d Cir. 2011). In these circumstances, an "understanding of Argentina's financial circulatory system," Pet App. 5 (quotation marks omitted), is necessary to locate Argentina's nonimmune assets. Even so, the district court limited its order by, for example, excluding information that would lead only to assets located in Argentina, as those assets presumably are beyond any court's reach. Pet. App. 7-8.

The United States' qualms stem from its premise that the FSIA does more than limit attachment, arrest, and execution.[8] As explained above, see part I, *supra*, that premise is mistaken. Thus, the fact that the FSIA prohibits execution against certain types of property in the United States, such as consular property, does not bar discovery regarding that property. But see U.S. Br. 24-30. Similarly, the fact that Federal Rule of Civil Procedure 69 permits other statutes to override it, U.S. Br. 31, is of no consequence; the FSIA does not conflict with Rule 69. (Besides, only Rule 69(a)(1) provides that "a federal statute governs to the extent it applies"; this case involves the distinct provisions of Rule 69(a)(2).) The FSIA does not restrict the courts' jurisdiction to conduct supplemental proceedings because it provides no penumbral "immunity in connection with" enforcement. See U.S. Br. 30; section I.A.2, *supra*. And the United States' arguments about the FSIA's purpose and the consequences of the discovery order are misplaced. See sections I.B and I.D, *supra*.

Sovereign immunity is particularly inapplicable here, as the discovery order is directed not to the sovereign itself but to third parties. Blocking third-party discovery would not advance the purpose of "giv[ing] *foreign states and their instrumentalities*

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[8] The United States suggests that its rule should be applied "[e]ven were the question here one of discretion rather than authority." Br. 24 n.11. But Argentina did not ask this Court to determine whether the district court abused its discretion. Arg. Br. i. Indeed, it appears to disavow discretion as a basis for reversal. Arg. Br. 47-48. In any event, as explained in the text, the district court did not abuse its discretion.

some protection from the inconvenience of suit." See *Dole Food Co.*, 538 U.S. at 479 (emphasis added). Sovereigns need not involve themselves in third-party discovery. And "comity and reciprocity concerns," U.S. Br. 33, are weak where the sovereign has voluntarily given information to banks, which are the routine targets of American discovery. See, *e.g.*, *Cotton* v. *PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) ("[Transaction records] are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PROFESSORS LESTER BRICKMAN AND RICHARD ESENBERG AND THE CENTER FOR THE RULE OF LAW AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI

Amici are law professors and the Center for the Rule of Law, a non-profit foundation of international scholars focused on issues related to the rule of law.[1]

Professor Lester Brickman is a professor of law and former acting Dean of the Benjamin N. Cardozo School of Law at Yeshiva University. Professor Brickman is a nationally known scholar in the area of complex tort litigation and has served as a consultant to, among others, the Administrative Conference of the United States; the U.S. Office of Education; the Legal Educational Institute of the U.S. Civil Service Commission; the National Science Foundation; the Council on Legal Education for Professional Responsibility; the Ford Foundation; the U.S. Law Enforcement Assistance Administration; and the U.S. Office of Legal Services.

Professor Richard Esenberg is an adjunct Professor of Law at Marquette University Law School and founder and General Counsel of the Wisconsin Institute for Law and Liberty. Prior to his tenure, he was a litigation partner at one of the largest firms in the United States and General Counsel at a privately held manufacturing firm with global operations. At Marquette, he has taught Civil Procedure and has spoken and written about discovery issues.

The Center for the Rule of Law and its affiliated scholars have long advocated for legal regimes that facilitate international trade and investment. Center

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[1] As required by Supreme Court rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amici, members, or counsel for amici, made such a monetary contribution. Consent has been given by all parties for this brief.

scholars have served on governmental tribunals dealing with application of rules respecting international trade and investment, on arbitration panels deciding disputes respecting rights associated with international trade and investment, and on bodies considering legal rules to govern international trade and investment. They have been and continue to be involved in application of rules respecting trade and investment and in writing and teaching about core principles underlying law respecting international trade and investment.

Scholars affiliated with the Center also have substantial interest in issues relating to immunity, including sovereign immunity, and to questions of legal process. Their scholarly writings include attention to problems associated with immunity rules, the appropriate shape of such rules, and the consequences that flow from particular immunity rules. Center scholars further have written and taught about rules governing legal proceedings and problems of efficiency and fairness related to particular approaches to legal proceedings. All of the matters noted above are implicated in the question before the Court in the instant case.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act substantially modifies the traditional law of sovereign immunity by adopting rules predicated on the restrictive theory of sovereign immunity. In contrast to a plenary theory of sovereign immunity, the restrictive theory permits jurisdiction over foreign sovereigns for liability arising from their commercial activity. By adopting that approach to immunity, FSIA facilitates commercial activity on the part of foreign nations and

creates an environment in which private parties may make and receive commitments from sovereigns with some confidence in their ability to rely upon and enforce those commitments. This understanding informs the nature of FSIA's limited grant of sovereign immunity and even more limited constraint on federal courts' authority to enforce judgments against foreign sovereigns.

To that end, FSIA specifies the conditions under which subject matter jurisdiction may be exercised over a foreign sovereign or its agencies and instrumentalities. It further provides that, when immunity is lifted and jurisdiction exists, a foreign sovereign may be held liable on the same basis as any other litigant. In keeping with the division between governmental and commercial activities, FSIA places restrictions on the ability of American courts to execute upon assets located in the United States, essentially exempting assets most likely to be used for governmental (non-commercial) functions.

FSIA does not, however, place any limitation on discovery directed to identifying other assets or restrict activity directed to assets located abroad. No such extraterritorial immunity or categorical ban on discovery is required by FSIA and none should be implied. The discoverability of assets is left to the otherwise applicable provisions of the Federal Rules of Civil Procedure and, as always, the amenability of such assets to execution is a matter for the law of the jurisdiction in which they may be found.

Discovery of the identity and location of assets that may not be attached by American courts does not, quite obviously, subject them to attachment. The availability of such discovery is the norm for judgment creditors, even for those seeking information on assets

abroad that may not themselves be attached by American courts. These background rules on discovery were left in place by FSIA except insofar as the statute creates express exceptions.

An implied ban on the discovery of such assets would transgress FSIA's basic predicate that, except as specified in the statute, sovereigns subject to American courts' jurisdiction are to be liable in the same manner and subject to the same rules as anyone else. Imposing categorical restrictions on discovery in suits against foreign sovereigns, beyond those contained in FSIA, would be inconsistent with this Court's consistent refusal to impose categorical limitations on discovery of information residing abroad; further, such new restrictions would place judgment creditors of foreign sovereigns in the untenable position of having to "guess" where attachable assets might be located.

To the extent that discovery of particular assets might compromise the unique interests of a sovereign judgment debtor, these interests can be dealt with by courts through the exercise of judicial discretion in the oversight of discovery in each individual case. Concern about possible overreaching in discovery requests should not be addressed by a categorical ban on jurisdiction or on the ability of parties to conduct discovery where jurisdiction exists.

Finally, even if this is not the proper approach to discovery directed to a foreign sovereign or its agencies and instrumentalities, it is certainly appropriate for discovery directed to third parties holding information regarding sovereign assets. Certainly any confidentiality concerns that might be legitimately asserted by a foreign sovereign can be addressed in the context of

particular discovery requests and not by a categorical rule.

ARGUMENT

I. FSIA Limits Jurisdictional Immunity for Sovereigns and Provides Expressly Constrained Limits on Enforcement Powers of American Courts.

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, codifies an evolution in the concept of immunity from judicial process for foreign sovereigns by restricting the circumstances where immunity will be granted. It is a culmination of the move from the more formal and abstract doctrine of absolute immunity—by which a sovereign was regarded as beyond the reach of foreign courts by its very nature—to a more functional approach, typically referred to as "restrictive immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

While sovereigns continue to enjoy immunity for actions that are governmental in nature (*jus imperii*), they are generally not immune when engaging in commercial activities or acting as a market participant (*jus gestionis*). Similarly, foreign sovereigns may be subject to the jurisdiction of our courts when, to induce others to enter into commercial transactions with them, they consent to jurisdiction of the courts.

This functional approach is not only a matter of fairness for those who do business with sovereign nations, but essential to the existence of international markets in which foreign sovereigns might participate. Private entities would reluctantly—if ever—contract with or extend credit to foreign nations if they could not enforce their legal rights in a court of law.

Reflecting on the rise of restrictive immunity, this Court has observed that "the enormous increase" in trade activities by foreign sovereigns "made essential 'a practice which will enable persons doing business with them to have their rights determined in the courts.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 701 (1976). This more limited notion of immunity is not a regrettable insult to a sovereign's integrity, but an essential aspect of its ability to participate in markets and enjoy the benefits of commercial activities.

Of course, this modification of immunity will subject foreign sovereigns to obligations and liabilities that they may prefer to avoid. But FSIA represents a Congressional determination that these burdens are justified—even essential—for a well-functioning global economy in which states are commercial participants and partners. Thus, assertions of the need to defer to sovereigns' wishes or invocation of the "grace and comity" to which they would otherwise be entitled do very little work in assessing the scope of FSIA. The imposition of those burdens—and the suspension of that comity—is a feature of FSIA. The question is not whether FSIA ever imposes these burdens (it does), but when it imposes them.

Although FSIA immunity is not completely described as differing treatment of claims based on the commercial and governmental activities of states, *see* 28 U.S.C. §§ 1604-1607, this distinction between the commercial and non-commercial activities of foreign sovereigns informs much of its structure. Jurisdictional immunity, while it can also be waived, is lifted for certain commercial activity within the United States or having a direct effect here. *See* 28 U.S.C.

§ 1605(a)(2). Once jurisdiction is established, a sovereign for whom jurisdictional immunity has been waived stands in the position of any other litigant. 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances ....")

But, as Petitioner notes and several courts have observed, to impose liability on a foreign sovereign for its commercial activities (or when it has consented) is a distinct matter from permitting execution against assets in the United States that may be used for its governmental functions. If acts and functions which are *jus imperii* are to be respected, an American judgment cannot permit the attachment of any and all assets to be found in the United States. Thus, FSIA enacts a separate and independent restriction on attachment and execution by limiting courts' authority to attach or seize certain types of sovereign assets. This approach conforms to the basic principle of restricted immunity. Having lifted *jurisdictional immunity* and permitted the imposition of liability upon sovereigns for certain types of activities, Congress limited the *enforcement power* of American courts to ensure that certain types of property in the United States required and useful for a sovereign's governmental activities would not be seized in the event of such liability. *See* 28 U.S. §§ 1609-10. Protection of these assets serves the same interests as the restricted immunity that shapes jurisdictional authority under FSIA.

As the Fifth Circuit has noted, "[o]ne of the chief motifs of the FSIA is to limit as much as possible

disrupting the 'public acts' or '*jure impereii*,' of sovereigns, while restricting their purely commercial activity. ... Confiscating funds that are being put immediately to some sovereign use interrupts a sovereign's public acts ...." *Connecticut Bank of Com. v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002) (citations omitted). Thus, FSIA limits attachment and execution against sovereign property in the United States to, among other things, property that "is or was used for the commercial activity upon which the claim [resulting in judgment] was based ..." 28 U.S.C. § 1610(a)(2) The assets of an agency or instrumentality of a sovereign in the United States receive similar, although less extensive, protection. 28 U.S.C. § 1610(b)

Thus is an important carve-out from the enforcement jurisdiction of federal courts, but a carefully cabined one that should not be read to confer a broader generic immunity. At the risk of belaboring the obvious, limiting attachment and execution against certain assets located in the United States does not immunize assets located outside this country. It says nothing about limiting discovery that would otherwise be available under Fed.R.Civ.P. 69. Such discovery is not generally limited to assets that may be attached and executed upon by American courts, i.e., an American judgment creditor can normally take discovery of persons subject to the jurisdiction of American courts to "hunt" for attachable assets abroad. *See* pp. 16-17, *infra*.

Thus, if assets other than those subject to attachment and execution under FSIA are potentially subject to attachment and execution abroad, discovery directed to obtaining information about such assets would normally be available to a judgment creditor. For Petitioner to categorically block such discovery,

they must find some restriction upon that discovery in FSIA or cognate law. It cannot.

II. Limitations on Execution Do Not Confer Immunity from Discovery Where Jurisdiction Over a Sovereign—or Any Other Party—Exists.

Petitioner's claim that a categorical restriction on discovery exists—even in cases where FSIA supports jurisdiction—turns on an unexamined (and logically flawed) syllogism. Petitioner begins by noting that courts have found FSIA's recognition of limited jurisdictional immunity implies immunity from general discovery until a party seeking to assert a claim against a foreign sovereign can establish jurisdiction (no jurisdiction means no discovery). In addition to limiting jurisdiction, FSIA limits execution. As a matter of logic, Petitioner says, even limited exceptions to ordinary rules on execution require an immunity parallel to FSIA's jurisdictional immunity (no U.S. execution authority means no discovery). Petitioner further implies that FSIA should be read to bar discovery of any assets held by a sovereign judgment debtor until it can be established that assets potentially found in discovery not only are subject to execution but are subject to execution within the United States (no execution within the United States means no discovery).

Even a cursory examination of the syllogism reveals its flaw. Jurisdictional immunity confers protection from the obligation to litigate. It would be empty protection if sovereigns entitled to its protection were forced to defend fully whatever claims might be asserted against them—including submitting to merits discovery—before a determination of whether

or not immunity from suit applies. Thus, courts have held that jurisdictional immunity implies that discovery must be limited to matters bearing on the applicability of immunity until the preliminary jurisdictional issue is resolved. The starting point for Petitioner's syllogism is valid, and indeed, with one exception, all of the lower court cases that Petitioner rely on arise in the context of jurisdictional immunity.

But limitations on enforcement of a judgment in American courts do not relieve a judgment debtor of the obligation to pay or insulate it from litigation attempting to attach or execute against assets located abroad. That is the well-established background rule. *See* pp. 16-17, *infra*; *Brief For The United States As Amicus Curiae In Support of Petitioner*, p. 26. FSIA by its terms confers no broader immunity from discovery, no blanket protection against execution and attachment, and no immunity on attachment or execution against assets located outside the United States. FSIA does not prevent an American judgment creditor from taking its judgment and seeking to have it recognized abroad as a prelude to seizing overseas assets of a sovereign judgment debtor. It places no limitation on the ability of such a judgment creditor to employ otherwise available discovery mechanisms to determine where those assets might be.

Execution immunity is entirely different from jurisdictional immunity. It does not confer protection from the obligation to litigate. Indeed, it can only come into question *after* that obligation has been established and the ensuing litigation has resulted in an adverse judgment. Execution immunity does not protect a sovereign from the need to litigate but only provides that certain of its assets cannot be attached by an American court. These can generally be described as

those that may be used for governmental functions and not those associated with commercial functions (and, at least, with respect to the sovereign itself, those commercial functions giving rise to the claim.) Immunity from the discovery of other assets—that may be subject to execution elsewhere—is not necessary to ensure that this limited protection of certain classes of assets is effective. Discovery alone leaves them untouched.

In short, one of these things is not like the other one. Execution immunity is a restriction on enforcement authority and not on jurisdiction. *First City, Texas-Houston, N.A. v. Rafidain Bank* ("*First City, Texas-Houston, N.A.*") 281 F.3d 48, 54 (2d Cir. 2002) ("No doubt, courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities ..." but this implicates the court's discretion, not its subject matter jurisdiction).

The question to be answered here is whether restrictions on discovery can be implied from restrictions on attachment and execution in the absence of any express limitation on discovery and in the face of FSIA's explicit recognition that, except as otherwise provided, a sovereign for whom jurisdictional immunity has been lifted is to be treated like any other litigant. Petitioner's syllogism is of no help in reaching that answer.

To be sure, immunity from execution incidentally relieves a foreign sovereign from the obligation to engage in certain types of litigation, i.e., resisting attempts to attach immune assets. But it is not, in and of itself, conferral of immunity from the obligation to litigate. If discovery is reasonably calculated to lead to the identification of assets that might be attached elsewhere, then it ought to be permitted, subject to

reasonable judicial oversight and the protection of any true privileges or confidences.

A. FSIA Confers No Immunity from Discovery Once Jurisdiction Lies.

A limitation on discovery goes hand in hand with a limitation on jurisdiction. No jurisdiction—no litigation, including discovery. But, "[o]nce a court is entitled to exercise subject matter jurisdiction over the suit, it has the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered." *Autotech Techs, LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007).

There is no reason that this principle should not apply where FSIA has lifted the bar of sovereign immunity., *First City, Texas-Houston, N.A.*, *supra*, 281 F.3d at 54 ("We think that where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case.") Once the bar of immunity is lifted, a sovereign subject to jurisdiction under FSIA is just like any other litigant, 28 U.S.C. § 1606, unless and until it can point to some other statutory exemption from otherwise applicable provisions of the Federal Rules of Civil Procedure and other applicable statutes.

For Petitioner, the exemption is to be found in the limitation on those assets that can be executed upon by an American court under FSIA. But that exemption by its terms confers only immunity from execution not discovery and, as we have seen, there is no logical reason to imply the latter from the latter.

As more than one court has noted, once a court is entitled to exercise subject matter jurisdiction, it has "the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered. *Autotech*, 499 F.3d at 744.This is clear from the structure of FSIA:

> Jurisdiction (as well as immunity) is addressed in § 1604, which is captioned "Immunity of a foreign state from jurisdiction," and § 1605, captioned "General exceptions to the jurisdictional immunity of a foreign state." In contrast, later sections of the statute address various stages of a proceeding that has passed the jurisdictional hurdles. Sections 1609 and 1610 respectively outline the rules for "[i]mmunity from attachment and execution of the property of a foreign state" and "[e]xceptions" thereto. These sections delimit the scope of the district court's power to enter orders executing a judgment. They are, in the final analysis, nothing more than restrictions on the court's remedial and enforcement powers. Section 1609 says that, subject to certain exceptions, "the property in the United States of a foreign state shall be immune from attachment, arrest, and execution ..."; section 1610(a) lists those exceptions, in effect indicating when the property of a foreign state may be attached in aid of execution on a judgment.

Autotech, 499 F.3d at 744-45.

Of course, Congress can—and has—enacted specific limitations on the otherwise available "panoply" of judicial enforcement tools in the case of foreign sovereigns. But one set of limitations on enforcement,

i.e., protection of certain assets located in the United States, does not imply another set of limitations, i.e., protection from the need to disclose other assets that may be subject to execution. Indeed, we would not normally expect the fact that assets cannot be attached by an American court to block discovery of the identity and location of those assets so long as jurisdiction over the controversy has been established.

B. Immunity from Discovery Cannot Be Inferred from Limitations on Execution.

An American court will always be unable to directly seize assets abroad. This is true whether or not the owner is a foreign sovereign. A judgment against a non-sovereign foreign entity does not mean that its assets located abroad can simply be seized at the direction of American courts. Whether or not such assets can ultimately be executed upon will be determined in a foreign proceeding and depends upon a foreign courts' determination of whether its domestic law permits recognition of the American judgment and seizure of the assets in question.

Yet no one reasonably could suppose that this jurisdictional limitation on attachment and enforcement disables the holder of an American judgment from seeking discovery of the identity or nature of assets held by a judgment debtor abroad. Indeed, much of the brief filed by amicus the Clearing House consists of complaints that American courts routinely permit such discovery. Even when foreign law would not itself permit such discovery, American courts, employing the balancing test set forth in § 442(1)(c) of Restatement (Third) of Foreign Relations Law (1987) are not only free to permit it but generally do as an

adjunct to proceedings legitimately conducted in the United States. *See Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987). As the Second Circuit has noted, "[d]iscovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure." *First City, Texas-Houston, N.A., supra*, 281 F.3d at 54, *citing* Fed.R.Civ.P. 69(a). If discovery is calculated to assist in the collection of a judgment, it is permitted. *Motorola Credit Corporation v. Uzan*, 203 F.R.D. 595 (S.D.N.Y. 2013).

Just as there is no requirement that a party seeking discovery demonstrate in advance that discovery will necessarily lead to dispositive (or even admissible) evidence, there is no requirement that a judgment creditor make some *a priori* showing that whatever assets are discovered will be subject to execution abroad. By definition, discovery is a search for the unknown and need only be reasonably calculated—not certain—to lead to admissible evidence or, as here, evidence of assets that may be subject to execution somewhere.

Indeed, in most cases, the forum court will be ill suited to address whether any particular discovered asset will be subject to execution where it is located. Determinations of foreign law are difficult and, in the absence of an order directing the disposition of an asset, should not be required at the discovery stage.

To require otherwise would turn considerations of judicial efficiency inside out. The Federal Rules of Civil Procedure favor a broad presumption in favor of discovery in recognition of the notion that the legal significance of discovered information, e.g., its admissibility or, as here, the ability to attach assets here or abroad is best considered once the information

has been obtained and the parties have moved to a forum best suited to the legal issues presented.

The idea, put bluntly, is that it is better to know what we are talking about before we assess its legal significance, to reserve difficult questions until they must be resolved, and to have them resolved by the tribunal best positioned to answer the questions definitively, which often will be in a foreign proceeding that actually seeks execution.

The alternative urged by Petitioner is for a judgment creditor to "guess" where assets might be located and initiate proceedings abroad in the hope that it has guessed correctly. Given that execution immunity is not compromised by discovery—it does not seize or freeze assets or otherwise impair a sovereign's enjoyment of the assets subject to discovery—it would be extraordinary to find such an implied exemption from the otherwise applicable rules where FSIA is silent on the matter. Once it knows what assets exist and where they are located, a judgment creditor such as NML can seek to domesticate its judgment in the appropriate forum and find out whether the assets are subject to attachment under applicable law.

To impose the burdensome alternative advocated by Petitioner would be poor public policy as well as bad law. It would place an almost insurmountable burden on judgment creditors in order to serve the vaguely stated convenience of foreign sovereigns who not only have been properly subjected to the jurisdiction of American courts, but also have been adjudicated to be liable for a debt that they now refuse to pay. This alternative construction would reach this result categorically, even though the interest of a foreign sovereign in avoiding the disclosure of assets that

might be attached abroad is not clearly established for the entire category affected.

More fundamentally, the policy championed by Petitioner is nowhere to be found in FSIA. To say that assets may not be attached in the United States is not to say that they may not be identified so that their immunity from attachment elsewhere may be tested. Creating such a restriction would be in derogation of the rules of civil procedure and in conflict with FSIA's assurances to international markets that, except as otherwise specified, foreign sovereigns subject to jurisdiction in respect of their commercial activities are to be treated like everyone else.

C. FSIA Does Not Confer Immunity on or Limit Discovery of Assets That May Not Be Attached by American Courts.

Perhaps recognizing that foreign sovereigns subject to US jurisdiction are generally subject to the same rules as other litigants, much of the discussion offered by Petitioner and supporting amici seeks to ground immunity from discovery in an assumption of actual or presumptive immunity from execution on the assets for which Respondent now seeks discovery. Indeed if these assets somehow are made immune from attachment or execution everywhere in the world based on a judgment rendered under FSIA, a categorical restriction on discovery might make sense. If FSIA were thought somehow to immunize assets abroad, then perhaps discovery of those assets would be thought part and parcel of that immunity by way of analogy to jurisdictional immunity's bar to merits discovery. On that view, it would serve no purpose to permit a judgment creditor discovery of assets that its judgment could never reach, and considerations of

grace and comity, as well as relevance and judicial economy, would counsel against permitting useless proceedings. In short, discovery would not be reasonably calculated to aid in collection of the judgment.

But FSIA does *not* confer worldwide immunity on assets outside the United States to satisfy a judgment rendered in American litigation for which FSIA has conferred jurisdiction. No one claims that NML or any other judgment creditor of a foreign sovereign cannot take their judgment abroad and see if the laws of a state in which sovereign assets might be located permit recognition of the judgment and execution upon those assets. Limitations on the ability of American courts to execute on assets located outside the United States, do not confer "a 'right' not to pay a valid judgment ...." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992). As the Ninth Circuit has noted, a judgment creditor of a sovereign "can seek to execute the judgment in whatever foreign courts have jurisdiction over [defendant's] assets," and "needs discovery to determine which courts those are." *Id.* Assets used for commercial activity in such states, while not subject to attachment and execution in the United States, may be subject to seizure where they are located. Creditors are entitled to discovery to learn whether such assets exist.

Given that FSIA does not purport to immunize foreign assets, discovery of those assets is not presumptively useless. It is very much in "aid of any money judgment that is rendered in the case." It is integral to the rights conferred by the judgment and will lead to no violation of sovereign rights protected by FSIA. The discovered assets will be disturbed only if applicable law permits it. Assets located abroad may

well be subject to execution abroad—even when those assets, if located in the United States, would be protected under FSIA. For example, French courts seem to recognize the same type of commercial activity exception recognized by FSIA while the United Kingdom appears less protective of sovereign assets than the United States. *See* Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and their Instrumentalities, and Some Proposals for Reform*, 25 Ariz. J. Int'l & Comp. L. 665, 684-687 (2008).

Grafting a limitation on asset discovery on to FSIA is not only unnecessary to serve the limitations on execution and attachment that are found in the law, it affords foreign sovereigns an entirely new immunity—one they do not enjoy under the law as written and as previously understood. The right to hide property that may be subject to execution and attachment elsewhere is not an immunity from attachment but freedom privilege from disclosure. In the absence of clear Congressional direction, this is not a privilege courts should create.

D. Immunity from Discovery Cannot Be Implied from Need to "Protect" Foreign Sovereigns.

Petitioner argues that such immunity should be found in FSIA because immunity—in some sense—is designed to protect foreign sovereigns from the need to litigate. Their argument essentially is this: because responding to—or resisting discovery—is "litigation" it presumptively should be forbidden; because discovery of assets that cannot be seized by American courts is not expressly authorized, the "grace and comity" due

foreign sovereigns require that an immunity from discovery be created.

There are at least two problems with this position. First and foremost, this position effectively amends existing law, and amendments to statutes are to be made by Congress and not the judiciary. Interpretations in derogation of otherwise applicable statutes and congressionally sanctioned rules—such as the Federal Rules of Civil Procedure—are disfavored.

And while FSIA may not expressly authorize discovery of assets located abroad, the Federal Rules of Civil Procedure do. Had Congress wished to deny judgment creditors their rights to conduct discovery that would otherwise be available to them, it would have been easy to do so. Had it intended to limit these creditors to whatever rights of discovery may or may not be available to them in whatever country a judgment debtor may or may not have assets, it could have said so. But, in the absence of law to the contrary, the normal rules apply. Congress ought not to be presumed to have conferred rights on judgment creditors that, as a practical matter, cannot be enforced anywhere in the world.

Second, saying that sovereigns' wishes should be deferred to or reciting platitudes about grace and comity and conjuring up vague threats of "retaliation" against American interests does no real analytical work. These were appropriate arguments to have made when FSIA was drafted; they can be advanced in support of proposed congressional amendments to the law; but they hardly suffice to alter the statutory scheme FSIA put in place. FSIA represents a judgment that, under certain circumstances, sovereigns ought to be made to answer in American courts. If, for example, the foreign sovereign has engaged in

commercial activity in the United States (seeking the advantages of our laws and the benefits of our markets) or, as in the present case, has voluntarily waived immunity in order to induce others to lend money, Congress has determined that the considerations pressed by Petitioner do not warrant immunity from suit and judgment.

As this Court has noted, "recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Alfred Dunhill*, *supra*, 436 U.S. at 700. In other words, there is no rule that more immunity is better. Where, as here, Congress has acted, its determination of where immunity ends must be respected.

Congress did not want the exceptions to immunity for commercial activity and in cases where immunity is waived to jeopardize certain assets in the United States deemed necessary to a foreign government's sovereign activities. In enacting the restrictive view of sovereign immunity, Congress sought to ensure that its waiver of jurisdictional immunity would not empower American courts to seize assets that predominately serve other sovereign purposes. Obviously, Congress could have no interest in and could not have intended to impose its views on execution immunity upon other states with respect to those states' treatment of the assets of other foreign states.

FSIA execution immunity serves only to ensure that whatever local law may provide with respect to execution against foreign assets be respected by requiring that attachment and seizure of those assets be accomplished through proceeding where they are

located. Simply permitting a judgment creditor to locate those assets through otherwise applicable discovery procedures does not disturb that immunity.

E. Arguments for Implying a Ban on Discovery Rely on Assumptions That Are Either Inapposite or at Odds with Established Law.

Amicus The Clearing House argues for an implied limitation on discovery in the provisions of 28 U.S.C. §§ 1781-83. Sections 1781 and 1783 permit letters rogatory and the compulsion of US persons abroad to give evidence as to assets located abroad. Neither has anything to do with whether persons within the United States and subject to the jurisdiction of its courts may be compelled to provide routine discovery as to assets abroad.

Perhaps in recognition of this, The Clearing House focuses on § 1782 which empowers US courts to order discovery within the United States in aid of actual or contemplated foreign proceedings. This, in its view, implies that no other discovery in aid of a foreign proceeding, such as execution against assets located abroad, may be had.

Section 1782 is designed to permit discovery of information located here when there is no American litigation of judgment. It has nothing to do with whether the Federal Rules of Civil Procedure permit discovery of information located abroad in aid of enforcing an American judgment. Where, as here, there has been litigation resulting in judgment, it is obviously inapposite. The Federal Rules of Civil Procedure govern such discovery and there is no reason to think that section 1782 would address it. Indeed, the Clearing House acknowledges that the

Federal Rules make discovery of information located abroad but held by persons subject to the jurisdiction of federal courts available to American litigants and judgment creditors. Yet much of the Clearing House's brief rails against the "burdens" and "outrage" of what it regards as federal courts' unfortunate willingness to allow discovery of information located abroad from persons subject to the jurisdiction of American courts.

The availability of that discovery does not constitute the kind of extraterritorial reach rejected in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). That case did not involve jurisdiction but instead assessed whether the Securities and Exchange Act applied to Australian securities. *Morrision* declined to apply U.S. law to claims by Australians, of misconduct by other Australians causing harm in Australia.

This case is different. Argentina marketed debt instruments in the United States to U.S. citizens and investors; Argentina consented to jurisdiction over disputes respecting that debt here and promised these U.S. creditors that it would not claim sovereign immunity in actions seeking to enforce that debt. The judgment against Argentina reflects harm inflicted on American investors arising out of Argentina's commercial activity in the United States. That is why the case against it was permitted to go forward under FSIA. The discovery sought here seeks information reasonably calculated to lead to the enforcement of the judgment reached in that litigation, even as it respects FSIA's limitations on attachment and execution. It seeks that discovery, moreover, from persons subject to the jurisdiction of American courts.

This Court's treatment of § 1782(b) is instructive as to the proper approach here. In *Intel Corporation v. Advanced Microdevices, Inc.*, 542 U.S. 241 (2004), this

Court was asked to infer a series of a priori and categorical limitations on the scope of discovery under that section. It was asked to require that a foreign proceeding actually be initiated prior to discovery and that parties seeking discovery show that the information sought would be discoverable abroad and that it be discoverable in an action initiated in the United States.

None of these limitations were to be found in the language of § 1782(b) itself, but each was urged as necessary to prevent discovery abuse and avoid offense to foreign governments. The Court, however, refused to imply extra-textual categorical limitations on discovery, stating instead that abuse in any particular case was best addressed by exercise of judicial discretion. *Id.* at 258-59, 260-63.

A similar approach was taken by this Court in *Société Nationale*. In that case, the Court was asked to hold that parties seeking discovery from a national of a signatory to the Hague Evidence Convention. As here, the limitation was urged on the basis of international comity and respect for foreign governments that may not permit—and even attempt to block—the more liberal discovery permitted in American courts. The Court rejected a categorical limitation, instead favoring a contextual consideration of the competing interests presented by particular requests for discovery. *Société Nationale*, *supra*, 425 U.S. at 543-544 ("Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than the petitioners' proposed general rule would generate.")

While *Intel* and *Société Nationale* are not directly controlling, they demonstrate this Court's reluctance

to imply categorical limitations on discovery in the absence of clear textual warrant and based upon abstract notions of international comity. Discovery from, or even related to, foreign sovereigns may raise prudential concerns, but they are best addressed in context and through exercise of a district court's discretion and not a limitation on its jurisdiction.

III. Discovery Abuses Are Properly Addressed as Matters of Discretion and Oversight, Not Jurisdiction.

Much of the briefs filed by Petitioner and amici supporting the Petitioner complain of the breadth of the discovery order here and assert that it may reach certain assets that are unlikely to be subject to execution anywhere. Amici take no position on the scope of this or any other particular order. We do note that orderly treatment of the identity and location of assets would seem to be a distinct question from the amenability of those assets to execution and not ripe for determination at the discovery stage.

Nevertheless, it is possible that the distinct interests of foreign sovereigns may be impaired by certain forms of discovery directed to certain types of assets. The mere possibility that this asset discovery may present such difficulties, however, does not warrant a categorical rule prohibiting it. The Federal Rules provide courts with ample authority to address such concerns as they arise. Courts that have properly permitted such discovery as was ordered here have noted the need to proceed with circumspection regarding sovereign assets and recognized the ability of courts to craft orders balancing and accommodating any particular concerns.

But the need for such judicial superintendence does not, as it did not in *Société Nationale* and *Intel*, warrant categorical—and extra-textual—limitations on discovery.

IV. Any Discovery Immunity Applicable to Sovereigns Does Not Apply to Discovery from Third Parties

A word is in order about the claim that FSIA can render third parties immune from discovery related to a sovereign. As Respondent points out, nothing in FSIA comes close to saying so. Nor does FSIA's structure imply such emanating immunity.

Petitioner argues that execution immunity implies freedom from the obligation to litigate questions that the grant of immunity resolves in the sovereign's favor. To some extent, this is a truism. If, for example, Respondent attempted to attach clearly immune assets, Argentina would be entitled to a prompt dismissal without the need to litigate any other issues that might be raised by an attempt to execute against the assets.

For reasons set forth above, we do not believe that such implied immunity could ever apply to discovery of assets that might be attachable elsewhere or to information reasonably calculated to lead to the identity of such assets. But even were this not the case, any such implied immunity enjoyed by the sovereign itself cannot be categorically extended to discovery directed to third parties. While both Petitioner and supporting amici complain that the disclosure of such information might be undesirable for a sovereign, this is a far cry from recognizing a legally protected interest against such disclosure.

In short, Argentina need not litigate over discovery directed to a third party because disclosure of the requested information does not harm Argentina in a legally cognizable way. It does not seize or attach its assets. It subjects it to no legal command.

To be sure, it is possible that Argentina might make a claim of confidentiality or privilege with respect to some of the requested information. It would certainly be free to claim those protections as circumstances warrant. But the possibility that it might have a cognizable privacy interest with respect to some assets does not warrant a categorical ban on all discovery of assets that might be subject to attachment somewhere. That Argentina would "rather not" have any one know about information for which no claim of confidentiality or privilege can be successfully maintained is a thin reed upon which to rest an implied immunity extending to third parties.

CONCLUSION

For the foregoing reasons, Amici Professors Brickman and Esenberg and the Center for the Rule of Law request that the decision below be affirmed and this Court reject the claim of an implied immunity from discovery of assets that may be subject to execution abroad in the Foreign Sovereign Immunities Act.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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REPUBLIC OF ARGENTINA, PETITIONER,

v.

NML CAPITAL, LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CLEARING HOUSE AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE CLEARING HOUSE AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

Established in 1853, The Clearing House is the United States' oldest banking association and payments company.[1] It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization that represents, through regulatory comment letters, amicus briefs, and white papers, the interests of its member banks on a variety of important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearinghouse, funds-transfer, and check-image payments made in the United States.

The Clearing House does not condone Argentina's failure to pay the judgments that respondent has obtained against it, but that is not the issue in this case. The question here is the extent to which third parties may be enlisted in efforts to enforce those judgments. The decision below imposes severe burdens on financial institutions as part of post-judgment proceedings. Specifically, the decision below orders nonparty fi-

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have consented to the filing of this brief.

nancial institutions to conduct extremely burdensome searches in various jurisdictions all over the world—even if those searches violate foreign law, and despite the fact that the information can be used (if at all) only in future and foreign proceedings. That type of extraterritorial discovery places an unprecedented strain on nonparties generally, and even more so with respect to financial institutions, which are routinely the target of post-judgment enforcement efforts and therefore are disproportionately affected by the burdens of worldwide discovery. Accordingly, The Clearing House and its members have a substantial interest in this Court's resolution of this case.

SUMMARY OF ARGUMENT

I. A. The decision below fails to consider the extensive burdens and jeopardy it imposes on nonparty financial institutions. Under that decision, nonparties may be ordered to perform difficult and costly searches in numerous foreign jurisdictions. Moreover, even when disclosure of clients' financial information would violate the laws of those foreign jurisdictions, lower courts often order it anyway, putting financial institutions and their employees at the real risk of criminal and civil penalties. Further, subpoenas seeking worldwide discovery are extremely difficult to challenge either in the trial court or on appeal. As a result, nonparties often have little choice but to comply, meaning that they incur not only significant costs but also repercussions from foreign regulators and law enforcement authorities (whose laws have been flouted) and from foreign clients (whose confidential information has been disclosed).

B. As a matter of both logic and experience, the burdens of overbroad discovery inescapably flow

through to foreign states. As to the sovereign debtor, it does not matter whether a subpoena is directed to the sovereign itself or its chosen financial institution: either way, disclosure of the sovereign's confidential records inflicts the same injury. It impugns the foreign sovereign's dignity by subjecting it to intrusive inquiries about its assets located overseas. The injury to sovereign interests is even greater when the discovery would be barred or limited under the laws of the relevant foreign jurisdiction. Foreign states are understandably offended when litigants avoid foreign procedures and limits by turning to U.S. courts accustomed to different notions of privacy and disclosure. Ordering discovery in those circumstances undermines principles of comity and reciprocity and impairs the United States' relationship with foreign nations.

II. A. Although the decision below ignores the severe burdens on nonparties and foreign sovereigns, Congress has taken a different, more balanced approach. It has authorized only limited forms of extraterritorial discovery in aid of U.S. proceedings. Under the FSIA, post-judgment discovery must be relevant to determining some type of relief authorized by the Act. Other federal statutes authorize U.S. courts to obtain discovery located in foreign countries in aid of domestic proceedings (letters rogatory under 28 U.S.C. 1781); to order discovery in the United States in aid of foreign proceedings (discovery orders under 28 U.S.C. 1782); and to obtain the presence of U.S. persons overseas (subpoenas under 28 U.S.C. 1783). What Congress has *never* done is take the giant step of allowing U.S. courts to order foreign discovery in aid of foreign proceedings. Congress has simply left that matter to foreign states and their own judicial systems. Neither the FSIA nor any other

source of federal law should be read to grant an authority that Congress has never seen fit to bestow.

B. The Federal Rules of Civil Procedure likewise do not authorize U.S. courts to order nonparties to produce foreign discovery for use solely in foreign litigation. The courts below erred by failing to interpret the Rules with due respect for the legitimate interests of foreign sovereigns and litigants. Neither Rule 45 nor Rule 69 supports the discovery ordered in this case. Rule 45 limits discovery directed toward nonparties—limits that the court of appeals did not even acknowledge and that respondent cannot satisfy. Rule 69 does not create a freestanding right to discovery, but rather allows discovery in post-judgment proceedings only in accordance with the normal rules governing discovery. Rule 69 therefore does not set aside the express limitations in Rule 45. Nor should it be read to create precisely the right to extraterritorial discovery in foreign litigation that Congress has never conferred directly.

C. This Court has expressed appropriate concern about projecting the reach of U.S. law beyond our shores in the absence of express congressional authorization. At a minimum, each of the federal laws potentially applicable to this case gives no "clear indication of an extraterritorial application." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). Under that standard, none of those federal laws authorizes discovery of materials located abroad solely for use in potential foreign litigation. If anything, the usual presumption against extraterritoriality is even more warranted in this context than in the securities-law context at issue in *Morrison*, because extending the reach of federal law here would interfere with the sovereignty of foreign nations. In this case, two non-

party financial institutions have been ordered to conduct worldwide discovery related to a foreign sovereign's overseas assets—assets that the parties acknowledge are not subject to attachment or execution in the United States. That is a remarkable result, and one that should require a clear, affirmative indication from Congress.

ARGUMENT

The decision below holds that, notwithstanding the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, a judgment creditor may obtain broad, worldwide discovery of a foreign state's financial records from nonparty financial institutions, even if relevant only to foreign litigation and even if compliance would expose the financial institutions to civil and even criminal proceedings under foreign law. The court of appeals rested its decision on two bases: *first*, that discovery requests directed to nonparty financial institutions burden only those institutions, not foreign sovereigns themselves, and the burdens on those third parties can be largely ignored; and, *second*, that in any event such discovery does not implicate the sovereign immunity interests protected by the FSIA. See Pet. App. 3 (concluding that "Argentina's sovereign immunity is not affected" because "discovery is directed at third-party banks" and "the district court ordered only discovery, not the attachment of sovereign property").

Neither of those bases is correct. As a matter of both experience and common sense, worldwide discovery into the financial records of sovereign states imposes severe burdens on financial institutions and sovereigns alike. Gathering information from bank branches across the globe, potentially in violation of

foreign law, has proven exceedingly difficult when it has been possible at all, and the injury to a sovereign from the disclosure of its sensitive financial information is obvious. The lower courts' analysis essentially disregards those burdens, although they are and should continue to be highly relevant in interpreting the FSIA and other federal laws. The magnitude of the burdens at issue only underscores that U.S. courts lack authority to order extraterritorial discovery of a foreign sovereign's financial records for use in future foreign litigation.

I. WORLDWIDE DISCOVERY INTO THE FINANCIAL RECORDS OF FOREIGN SOVEREIGNS PLACES SEVERE BURDENS ON BOTH FINANCIAL INSTITUTIONS AND THE SOVEREIGNS THEMSELVES

Plaintiffs are increasingly attempting to use American courts in their efforts to reach assets held by foreign sovereigns abroad that are not subject to attachment or execution in the United States under the FSIA.[2] The decision below only encourages those ef-

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[2] In this case and others, distressed-debt funds—or so-called "vulture" funds—have requested broad post judgment discovery against financial institutions in order to track the assets of foreign states overseas. See, *e.g.*, *Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-cv-2715, 2013 WL 857730 (S.D.N.Y. Mar. 7, 2013) (permitting general asset discovery of Argentina and eighteen non-party banks). Such funds also have requested that federal courts declare foreign instrumentalities—for example, foreign central banks—to be alter egos of their parent governments, even though there are no attachable assets available in the United States. Vulture funds hope to use those alter-ego declarations to reach assets held by the foreign instrumentalities anywhere in the world. See, *e.g.*, *EM Ltd.* v. *Banco Central de la República Arg.*, No. 06-cv-7792,

forts. There is no need to speculate about the way in which such efforts impact both financial institutions and foreign sovereigns. In only the eighteen months since the decision below, lower courts have ordered extremely intrusive discovery into the financial records of various foreign states, including through orders directed at nonparty financial institutions.[3] Those orders—and the many that are sure to follow—inflict serious injury on financial institutions and foreign states. In deciding the scope of permissible post-judgment discovery under the FSIA, this Court should take into account the extraordinary burdens and jeopardy imposed by the kind of discovery ordered in this case.

Doc. No. 186 (S.D.N.Y. Sept. 26, 2013), *appeal docketed*, No. 13-3819 (2d Cir. Oct. 3, 2013).

[3] See, *e.g.*, 08-cv-2541, Doc. No. 371 (S.D.N.Y. Sept. 25, 2013) (granting motions to compel discovery against several nonparty banks pertaining to Argentina's assets); *Aurelius Capital Partners*, 2013 WL 857730, at *1 (denying protective order as to subpoenas served on Argentina and a motion to quash the eighteen subpoenas served on nonparty banks for general asset discovery of Argentina); see also *Thai Lao Lignite (Thailand) Co.* v. *Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 519 (S.D.N.Y. 2013) (denying sovereign immunity objections to discovery orders and holding that "discovery [could] proceed as broadly as it would in a typical post-judgment context without regard to immunity issues"); *Servaas Inc.* v. *Republic of Iraq*, No. 09-cv-1862, 2013 WL 3146787, at *5 (S.D.N.Y. June 19, 2013) (holding that the FSIA did not preclude ordering broad post-judgment discovery related to Iraq's assets), *aff'd in part, rev'd in part*, 2013 WL 5913363 (S.D.N.Y. Nov. 4, 2013).

A. The Decision Below Subjects Nonparty Financial Institutions To Massive And Often Contradictory Discovery Obligations

1. The type of broad, extraterritorial discovery at issue is incredibly difficult to perform under even the best of conditions, because it requires financial institutions to undertake potentially hundreds of searches all over the world. This case is an example: the subpoenas served here on two nonparties, Banco de la Nación Argentina (BNA) and Bank of America, N.A., demanded the production of documents relating to the account information for hundreds of separate international accounts—including transfers to and from those accounts—over the course of several years.[4] As banks have explained in this and other cases, they do not have centralized databases that would permit employees in offices here in the United States to conduct global searches for such information. Rather, employees in each foreign branch or affiliate must conduct their own searches, generally in their own native languages.[5]

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[4] See J.A. 39-76 (subpoena issued to Bank of America, N.A.); J.A. 77-105 (subpoena issued to BNA).

[5] See, *e.g.*, 08-cv-2541, Doc. No. 280, at 2-3 (S.D.N.Y. Feb. 10, 2011) (declaration of general manager at BNA's New York branch; New York employees are not able to obtain information regarding accounts at other BNA branches); *Blue Angel Capital I LLC* v. *Republic of Arg.*, No. 10-cv-4782, Doc. No. 171, at 4 (S.D.N.Y. Nov. 7, 2012) (declaration of Citigroup director and associate general counsel; "[T]he New York office of Citibank [could not] undertake a search for customer information held by its branch or affiliate offices offshore without engaging the active assistance of personnel located in the jurisdictions where the search is to take place, and those personnel are the only individuals with direct access to the information.").

That is not simply a matter of bookkeeping or computer software. One of the reasons that many foreign branches operate without centralized databases is that *foreign law often requires it*. The laws of the United States generally provide for more sweeping discovery than the laws of foreign nations. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct.*, 482 U.S. 522, 542 (1987) (*Aérospatiale*) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions."). By contrast, the bank-secrecy, data-protection, and privacy laws and regulations of many foreign countries more strictly prohibit financial institutions from disclosing the records of their customers in response to civil actions. See, *e.g.*, Swiss Penal Code, Art. 273; French Monetary and Financial Code, Art. L 511-33; Uruguay Decree-Law 15332, § 25. Subpoenas directed at nonparty financial institutions here in the United States often seek extraterritorial discovery that is barred by foreign law.

As a result, the New York bank branches that are subject to these subpoenas must do more than attempt to coordinate scores of foreign searches in numerous foreign languages—although that in itself is a Herculean task. They must also navigate dozens of foreign legal regimes in the process and attempt to avoid civil and even criminal sanctions. See, *e.g.*, *Blue Angel Capital I LLC* v. *Republic of Arg.*, No. 10-cv-4782, Doc. No. 169, at 1, 7 (S.D.N.Y. Nov. 7, 2012) (explaining that Citibank would have to conduct searches at over 100 offices around the world and consult with local counsel in each of those jurisdictions). That effort consumes enormous resources, and yet courts tend to systematically underestimate the costs because they are imposed on nonparties and are often

felt far beyond the courts' jurisdiction. Indeed, the lower courts' analysis in this case appears to take no account at all of the burdens imposed on nonparties by broad, extraterritorial discovery.

2. Even when ordering bank branches overseas to disclose their customers' financial information would likely violate foreign law, lower courts often do it anyway. See, *e.g.*, *Gucci Am., Inc.* v. *Weixing Li*, No. 10-cv-4974, 2011 WL 6156936, at *10-11 (S.D.N.Y. Aug. 23, 2011) (ordering discovery of information acknowledged to be protected by Chinese bank secrecy laws); *Gucci Am., Inc.* v. *Curveal Fashion*, No. 09-cv-8458, 2010 WL 808639, at *4-5, 8 (S.D.N.Y. Mar. 8, 2010) (ordering discovery in potential violation of Malaysian law); *Strauss* v. *Credit Lyonnais, S.A.*, 249 F.R.D. 429, 447-448, 456 (E.D.N.Y. 2008) (ordering discovery in potential violation of French banking law). That is because, even having shown that foreign law likely bars the discovery, courts generally require a financial institution to further establish that a multifactor balancing test for international comity likewise bars the discovery. See Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987) (Restatement). Depending on how a district court weighs those factors, a financial institution can be put to the Hobson's choice of violating either a U.S. court's discovery order or foreign law.

This case illustrates how imbalanced the test has become, with nonparty financial institutions almost always the loser. BNA contended that complying with the district court's discovery order would violate the laws of nine foreign jurisdictions. In a lengthy opinion, the court agreed that "ordering discovery would likely violate Uruguay's bank secrecy laws." *NML Capital, Ltd.* v. *Republic of Arg.*, No. 08-cv-2541,

2013 WL 491522, at *9 (S.D.N.Y. Feb. 8, 2013). The court noted that "[t]he punishment for violation can involve criminal sanctions on bank employees including three months to three years in prison" and "[a] violator could also receive fines of up to 50% of the minimum net worth and total or partial suspension of activities and revocation of its license." *Ibid.* The court nevertheless ordered production because, in its view, "the balance of applicable factors [under the Restatement] weighs in favor of disclosure." *Id.* at *1. The court therefore concluded "that compliance with the subpoena is warranted in this case even if it is in violation of foreign countries' laws." *Id.* at *12.[6]

This Court is currently awaiting the views of the Solicitor General in a similar case. See *Linde* v. *Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) (refusing to vacate sanctions against the U.S. branch of a bank for failing to produce foreign documents in violation of foreign laws), *calling for the views of the Solicitor General*, 134 S. Ct. 500 (2013); see also *Linde* v. *Arab Bank, PLC*, 463 F. Supp. 2d 310, 313 (E.D.N.Y. 2006) (ordering production of foreign documents in violation of "bank secrecy laws * * * [that] are broadly phrased and prohibit not only the bank, but also bank employees, from disclosing information"), *aff'd*, 2007 WL 812918 (E.D.N.Y. Mar. 14, 2007). As these cases

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[6] Notably, although the district court found that discovery was permissible in Argentina, Bolivia, and Chile, it did not find that discovery was permitted by Spain, Brazil, Panama, Paraguay, and the Cayman Islands. It instead concluded, in the face of competing evidence, that the laws of those nations are not clear with respect to whether they prohibit disclosing a customer's confidential information in response to a U.S. court's discovery order. It is therefore possible that the banks at issue here stand to face criminal or civil sanctions in countries besides Uruguay.

demonstrate, the danger to financial institutions from being ordered to violate foreign law is not abstract or academic; it is a real and ever-present concern that carries the risk of criminal and civil penalties for banks and their employees.

3. Although subpoenas seeking worldwide discovery inflict serious harm on nonparties, they are extremely difficult to challenge either in the trial court or on appeal. Federal Rule of Civil Procedure 45(d)(1) provides that the "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(d)(1) further provides that "[t]he court for the district where compliance is required must enforce this duty." But despite that clear language, lower courts often saddle the target of a subpoena with the obligation to prove that it should not be required to comply. That is precisely what the district court did here. See *NML Capital*, 2013 WL 491522, at *1 (finding that "[i]n all countries except Uruguay, BNA has failed to satisfy *its* burden of proof in demonstrating" that discovery was barred by foreign law) (emphasis added). Requiring nonparties to show that compliance will impose "undue burden or expense" effectively stands Rule 45 on its head by shifting the necessary showing from parties to nonparties.

There can be no disputing that the showing is very costly for nonparties to make. First, the nonparty financial institution must demonstrate that foreign law prohibits the requested discovery, which usually requires retaining an expert on foreign law for each foreign jurisdiction implicated by the subpoena. See, *e.g.*, *NML Capital*, 2013 WL 491522, at *4-9 (referring to declarations submitted by BNA regarding the laws

of nine foreign countries). Second, the nonparty financial institution must also demonstrate that the balance of factors under the Restatement tips in its favor, which typically requires submitting yet more evidence. For example, the nonparty has to address whether there are alternative means of securing the requested information. See *id.* at *11 (finding that BNA had not provided "details on what such [alternative] means would be" in this case). The nonparty also has to address the hardships that it faces from compliance. See *ibid.* ("Courts have required that the party resisting discovery provide information on the likelihood that the party would be prosecuted for producing the requested documents."). Needless to say, it is difficult for financial institutions to show a likelihood of prosecution, because they are not in the habit of flouting the laws of their host countries.

In the event that the district court interprets foreign law differently or strikes a different balance in the international comity factors, there is rarely any opportunity for meaningful appellate review. As a general matter, "[a] party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). Thus, to obtain appellate review and avoid violating foreign law, the financial institution must disregard the U.S. court's order and be held in contempt.[7] And even if the institution is willing to risk

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[7] Here, the district court's discovery order was appealable by Argentina, which was able to raise "the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity." Pet. App. 10 n.5. But that only highlights the inability of nonparties

that serious sanction, it faces the additional obstacle in cases like this one of proving that the lower court abused its discretion in balancing the Restatement factors. See, *e.g.*, *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 175-176 (2d Cir. 1998). In light of that deferential standard, nonparties are commonly left with no practical option other than to comply with extraterritorial discovery orders, no matter how broad, burdensome, or violative of foreign law.

4. When financial institutions comply with U.S. orders that have effects in foreign jurisdictions, that can cause foreign regulators to respond. In a recent case in the Second Circuit, Motorola Credit Corporation sought to collect a multi-billion dollar judgment against a group of defendants known as the Uzans. See *Tire Eng'g & Distrib. L.L.C.* v. *Bank of China Ltd.*, 740 F.3d 108, 112-113 (2d Cir. 2014). During post-judgment proceedings, the district court entered a restraining order prohibiting the transfer of any property belonging to the Uzans or their "agents." *Id.* at 113. That order was served on the New York branch of Standard Chartered Bank. The United Arab Emirates (UAE) branch of Standard Chartered subsequently identified significant interbank deposits in the UAE relating to a Jordanian bank that was allegedly an Uzan "agent." Although it sought relief from the restraining order, Standard Chartered's UAE branch nevertheless froze the deposits in the interim. See *ibid.*

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to obtain appellate review on their own initiative. In cases involving sovereigns, the decision to seek further review will rest with the sovereign; and in cases involving other types of parties, there may be no opportunity for further review at all.

That gave rise to action by Jordanian and UAE regulators. The Central Bank of Jordan confiscated documents from Standard Chartered's branch in Jordan. The UAE Central Bank debited sums equivalent to the interbank deposits from Standard Chartered's own account with the UAE Central Bank, and remitted those funds to the Jordanian bank. See 740 F.3d at 113. Although this issue concerned a U.S. court's restraining order rather than discovery order, the point here is simply that orders aimed at foreign conduct can cause substantial concern for foreign regulators. See, *e.g.*, *In re Advocat Christopher X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 12, 2007, Bull. crim., No. 07-83.228 (Fr.) (convicting an attorney for violating a French blocking statute); *Strauss*, 249 F.R.D. at 450-451 (ordering a bank to produce discovery in violation of the French blocking statute notwithstanding *Christopher X*).

5. When foreign bank branches disclose confidential client information, that inevitably affects the willingness of foreign clients to transact business with financial institutions that have any presence here in the United States. Financial institutions owe strict duties of confidentiality to their clients, and generally are not permitted to share with others any of the information they hold on behalf of their clients. See, *e.g.*, Matteo Zambelli & Chiara Zambelli, *Obtaining Information From English Banks for Use in Foreign Civil Proceedings: The Banker's Duty of Confidentiality*, 18 N.Y. Int'l L. Rev. 169, 169 (2005) ("The duty of confidentiality that a bank owes to its customer is said to be a cornerstone in the success of a banking system, as it lies at the heart of the banker-customer relationship."). If foreign clients are aware that, by conducting business with institutions that have U.S.

offices, their financial records will be potentially subject to discovery in U.S. courts as a result, they will be less willing to transact with or through those institutions in the first place.

B. The Decision Below Likewise Harms Important Interests Of Foreign States And Thus Implicates Significant Sovereign Immunity Concerns

The Republic of Argentina and the United States are correct that merely because the subpoenas at issue were served on nonparty financial institutions, Argentina's interests as a sovereign nation are no less affected. Changing the name on a subpoena does not change reality. Discovery of its confidential financial records imposes the same harms on a foreign sovereign, regardless of whether it is directed to the sovereign itself or to its chosen banker. More broadly, to the extent discovery seeks disclosure of confidential information in third countries, it often offends the regulatory interests of those countries' governments. Even if the goal in a particular case is to search out the assets of a foreign sovereign that has not honored a U.S. judgment, ordering such discovery has far-reaching harmful effects that go to the core of why foreign sovereign immunity exists in the first place. The kind of discovery ordered here inevitably risks irritating foreign states, impugning their dignity, impairing the United States' relationship with them, and ultimately undermining the international system of comity and reciprocity.

1. As explained above, financial institutions owe a duty to their clients to maintain their records in confidence. When that client is a foreign sovereign, revealing its records produces the same injury as for

any other client. Just as a foreign state regards the judicial seizure of its property as an affront, see *Republic of Phil.* v. *Pimentel*, 553 U.S. 851, 866 (2008), its dignity is no less offended when the United States permits discovery into its financial records in aid of seizure and execution in some other country. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011) ("As a general matter, it is widely recognized that the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery."); *id.* at 796 ("Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets.").

2. Ordering discovery of a foreign state's confidential financial records undermines the principles of comity and reciprocity that underlie the doctrine of foreign sovereign immunity. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003) (noting that foreign sovereign immunity is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns"). That is doubly true, of course, when disclosure violates foreign law. See *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165, 169 (2004) (any application of U.S. law that creates "a serious risk of interference" with a foreign nation's regulation of its own affairs would amount to "an act of legal imperialism"); *Doe* v. *United States*, 487 U.S. 201, 218 n.16 (1988) (observing that "international comity questions" are implicated by "attempts to overcome protections afforded by the laws of another nation"). When disclosure violates the law of the foreign juris-

diction in which the discovery is sought, there is an injury to yet another foreign sovereign.

At a minimum, such disclosure "may be regarded by foreign states as demonstrating a lack of respect and may cause friction in the United States' foreign relations." U.S. Cert. Br. 15. Indeed, it has long been true that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." Restatement § 442, Reporters' Notes; *Aérospatiale*, 482 U.S. at 548 (Blackmun, J., concurring in part and dissenting in part). The extent of that friction results from the fact that, as this Court has recognized, "[p]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran S.A.*, 542 U.S. at 171 (internal quotation marks omitted).

The friction is made worse because foreign countries have their own procedures for obtaining discovery in their own courts. In this case, for instance, BNA introduced evidence that each of the relevant foreign jurisdictions provides alternative means for obtaining the discovery that respondent has requested. See 08-cv-2541, Doc. No. 338, at 17 (S.D.N.Y. Sept. 13, 2012). Foreign states can reasonably regard it as unjustified when litigants do not seek information abroad pursuant to the procedures and limits that govern in those respective jurisdictions.[8] And by

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[8] In addition to showing respect for foreign sovereignty, requiring or encouraging litigants to seek discovery under foreign law when possible would have the additional benefit in many cases of

the same token, foreign states can reasonably regard it as offensive when litigants end-run foreign procedures and limits by turning to U.S. courts accustomed to different notions of privacy and disclosure. See, *e.g.*, Petition for Writ of Certiorari at 15, *Arab Bank* v. *Linde*, No. 12-1485 (June 24, 2013) (summarizing letters in the record from Jordanian and Palestinian officials regarding the importance of due respect in American courts for their financial privacy laws).

In recognition of the fact that "[c]ross-border discovery has become a major source of international legal conflict," the American Bar Association's House of Delegates recently resolved that U.S. courts should "consider and respect" the "data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to" those laws, "with regard to data sought in discovery in civil litigation." Michael E. Burke, *Report to the House of Delegates*, 2012 A.B.A. Sec. Int'l L. Res. 103, at 1. It explained that "the laws of foreign countries, many with notions of privacy and disclosure that differ from or are much stricter than those in the United States[,] * * * are, quite frequently, given less than due consideration by courts in the United States." *Id.* at 2. The House of Delegates correctly concluded that "international comity" requires U.S. courts "to accommodate foreign interests even where the foreign system strikes a different balance," and that permitting discovery "in disregard or even defiance of foreign protective legislation" would "impede global commerce" and "harm the interests of U.S. parties in for-

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avoiding "undue burden and expense" on nonparties in U.S. proceedings under Rule 45.

eign courts." *Id.* at 2, 15 (internal quotation marks omitted).

II. U.S. COURTS LACK THE AUTHORITY TO ORDER THIS KIND OF EXTRATERRITORIAL DISCOVERY

Discovery is generally not a freestanding cause of action or form of relief in the federal courts. In this context, respondent must point to some source of law authorizing that discovery. See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery relating to any party's claim or defense."); 27 C.J.S. *Discovery* § 2 (2013) ("The purpose of discovery is to enable one who is asserting a right or claim to determine the exact nature of such right or claim and the extent thereof."). Here, there is no dispute that respondent seeks extraterritorial discovery concerning foreign assets that could be reached, if at all, only through litigation in foreign courts. But every available source of law—whether the FSIA, other federal statutes, the federal civil rules, or even state law as incorporated into federal law—accounts for the burdens that foreign discovery imposes on nonparties and sovereigns in ways that the lower courts here simply ignored. In short, no source of federal law supports unrestricted foreign discovery regarding foreign assets for use solely in potential foreign litigation.

A. Neither The FSIA Nor Other Federal Statutes Authorize U.S. Courts To Order Nonparties To Produce Extraterritorial Discovery Of A Foreign State's Financial Records For Use Only In Foreign Litigation

Respondent does not argue that any particular federal statute authorizes the discovery at issue in

this case. Rather, respondent contends only that the FSIA does not preclude such discovery. See Br. in Opp. 19. That contention is incorrect, but in any event it misses the broader point: namely, that no Act of Congress authorizes U.S. courts to order extraterritorial discovery of a foreign state's financial records for use solely in foreign litigation. Respondent needs to point to some authority for its discovery requests, not the absence of any denial of authority.

1. *The FSIA.* For the reasons given by petitioner and the United States, the FSIA does not permit the extraterritorial discovery ordered in this case. As the United States explains, the FSIA was enacted against the backdrop of a longstanding theory of absolute immunity. See U.S. Cert. Br. 1, 8. Although the FSIA creates an exception to that immunity for attachment of or execution on certain assets located in the United States, it makes no such exception for property located outside the United States. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world."). Here, there is no dispute that respondent's requested discovery relates to assets of the Republic of Argentina that are located abroad. See Pet. App. 11. As a result, respondent's requested discovery is not relevant to determining any form of relief authorized by or available under the FSIA. Respondent therefore must point to some source of authority other than the FSIA to justify its discovery request.

2. *28 U.S.C. 1781-1783.* Respondent has not sought discovery pursuant to Sections 1781, 1782, and 1783 of Title 28, and with good reason. Those statutes

set forth the circumstances in which U.S. courts can order either foreign discovery or domestic discovery in aid of foreign proceedings, and none of them allows the discovery at issue in this case. Quite to the contrary, those statutes show the careful balancing of interests in which Congress engages in this area. The lower courts' orders here ignore the balance of interests that Congress has struck.

a. Under Section 1781, U.S. courts have the authority to issue requests for international judicial assistance—or what are called letters rogatory—to obtain discovery located in foreign countries. Letters rogatory are consistent with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 1, Mar. 18, 1970, 28 U.S.C. 1781 (Hague Convention on Evidence), and are generally honored by signatory nations.[9] They are less disruptive to international relations than orders entered in U.S. courts because foreign countries or tribunals may decline to honor the requests—for instance, on the ground that doing so would violate foreign law. See, *e.g.*, *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 995 (10th Cir. 1977) (observing that the Ontario Supreme Court had declined to enforce letters rogatory because enforcement would have caused "a violation of [Canada's] Uranium Information Security Regulations"). Accordingly, letters rogatory reduce the likelihood that

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[9] See *Aérospatiale*, 482 U.S. at 562-63 (Blackmun, J., concurring in part and dissenting in part); *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions* 8 (2009) (noting "that the Evidence Convention is operating relatively smoothly and effectively").

nonparties will be subject to conflicting legal obligations under U.S. and foreign law.

b. Under Section 1782, U.S. courts have the authority to order discovery in aid of foreign tribunals. Specifically, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). That order may be issued in response to a "request made[] by a foreign or international tribunal or upon the application of any interested person." *Ibid.* The procedure established by Section 1782(a) governs the discovery of information that is intended "for use in a proceeding in a foreign or international tribunal." Here, respondent hopes to identify assets of the Republic that, although not subject to attachment or execution in U.S. proceedings under the FSIA, may be reached in future foreign proceedings.

Respondent, however, did not apply for an order directed to Bank of America and BNA pursuant to Section 1782(a). That may be because courts have held that Section 1782 only authorizes the compelled production of documents located here in the United States. See, *e.g.*, *In re Kreke Immobilien KG*, No. 13 Misc. 110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (collecting cases); *In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007) ("[F]or purposes of [Section] 1782(a), a witness cannot be compelled to produce documents located outside of the United States."). Even assuming Section 1782 permitted extraterritorial discovery, it still would need to be in aid of foreign litigation "in reasonable contemplation." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Here, respondent has not

shown that any proceeding to recover Argentina's assets in foreign jurisdictions "can or will be instituted within a reasonable period." *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 05-1717-JJF, 2008 WL 4861544, at *11-15 (D. Del. Nov. 7, 2008).

In enacting Section 1782, Congress considered what authority U.S. courts should possess to order discovery in aid of foreign proceedings. It extended that authority to ordering production of documents located in the United States—but not documents located abroad—when necessary for pending or reasonably contemplated future foreign proceedings. This Court should not read the FSIA or any other source of federal law to confer a power on U.S. courts that Congress declined to grant in Section 1782, especially when to do so would require extending the reach of U.S. law into foreign nations. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 97 n.5 (1967) ("This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold."); *Mitchell* v. *Fed. Bureau of Prisons*, 587 F.3d 415, 421 (D.C. Cir. 2009) ("[W]e refuse to conclude that with one hand Congress intended to enact a statutory rule * * * but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule.") (quoting *Abdul-Akbar* v. *McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (en banc)).

c. Under Section 1783, U.S. courts may issue subpoenas to U.S. persons located abroad. Specifically, any federal court may order the issuance of a subpoena requiring "a national or resident of the United States who is in a foreign country" to appear as a witness or to produce documents, if it is "necessary in the interest of justice" and in civil cases if it is "not possible to obtain" the testimony or documents "in

any other manner." 28 U.S.C 1783(a). Respondent did not rely on Section 1783 as the basis for its subpoenas or comply with the procedures that the statute requires, see 28 U.S.C. 1783(b), nor could it have done so. The statute would not apply here because the subpoenas at issue were served on bank branches in the United States—not bank branches "in a foreign country" as Section 1783(a) requires. See, *e.g.*, *Estate of Ungar* v. *Palestinian Auth.*, 412 F. Supp. 2d 328, 335 (S.D.N.Y. 2006); S. Rep. No. 1580, 88th Cong., 2d Sess. 3782 (1964) (noting that amendments to Section 1783 and other provisions related to "subpoenaing witnesses in foreign countries *in connection with proceedings in the United States*") (emphasis added).

* * *

Congress has provided different ways for U.S. courts to obtain discovery located in foreign countries in aid of domestic proceedings (letters rogatory under Section 1781), to order discovery here in the United States in aid of foreign proceedings (discovery orders under Section 1782), and to obtain the presence of U.S. persons overseas (subpoenas under Section 1783). What Congress has *never* done, however, is take the additional step of allowing U.S. courts to order foreign discovery in aid of foreign proceedings. Congress has appropriately left that matter to foreign states and their own judicial systems. Neither the FSIA nor any other source of federal law should be read to grant an authority that Congress has never seen fit to bestow.

B. The Federal Rules Of Civil Procedure Do Not Authorize U.S. Courts To Order Nonparties To Produce Foreign Discovery For Use Only In Foreign Litigation

The Federal Rules of Civil Procedure likewise should not be expansively interpreted to authorize U.S. courts to order nonparties to produce foreign discovery for use solely in foreign litigation. Nothing in the Rules contemplates that litigants will use federal district courts as "clearinghouse[s] for information" to gather documents for use in foreign proceedings. Pet. App. 7.

1. As an initial matter, the decision below is inconsistent with this Court's instructions regarding cross-border discovery in *Aérospatiale*. In that case, this Court held that the Hague Convention on Evidence is not the exclusive method of obtaining civil discovery from foreign entities that are party-defendants in U.S. litigation. See 482 U.S. at 529. Although *Aérospatiale* did not address whether U.S. courts may order nonparties to produce foreign discovery, it recognized that even as to parties, "American courts * * * should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Id.* at 546. Indeed, as especially relevant here, this Court emphasized that U.S. courts should "take care to demonstrate due respect for *any special problem confronted by the foreign litigant on account of its nationality or the location of its operations*, and for *any sovereign interest expressed by a foreign state*." *Ibid.* (emphasis added).

The decisions below throw that cautionary warning to the wind. They fail even to consider the difficulties

and conflicting legal obligations imposed on the nonparty financial institutions—such as the fact later found by the district court that discovery here puts BNA at risk of imprisonment, fines, and revocation of its banking license in at least one foreign jurisdiction (and potentially as many as six such jurisdictions, see *supra*, p. 11 n.6). Moreover, the discovery at issue in *Aérospatiale* was at least relevant to the claims being litigated in that case. By contrast here, respondent seeks discovery from nonparties that is not relevant to any claims capable of resolution in U.S. courts. Thus, if anything, the Court's direction in *Aérospatiale* to protect against the burdens of foreign discovery should apply with even greater force in this context.

2. In any event, the Federal Rules themselves do not authorize the discovery ordered in this case. Respondent served that discovery on Bank of America and BNA pursuant to Rules 34 and 45. See *supra*, p. 8 n.4; see also Fed. R. Civ. P. 34(c) (providing that discovery from a nonparty may be obtained "[a]s provided in Rule 45"). The court of appeals, however, did not address those rules. The court held instead that Rule 69 and New York state law authorize the discovery at issue. See Pet. App. 13-14. But whatever the purported source for respondent's subpoenas, none allows this type of extraterritorial discovery.

a. *Rule 45.* Far from providing support for respondent's position, Rule 45 is clear on its face that nonparties are entitled to greater protection from burdensome discovery than party-litigants. Rule 45 requires courts to "protect a person who is neither a party nor a party's officer from significant expense resulting from compliance" with a subpoena. Fed. R. Civ. P. 45(d)(2)(B)(ii). Rule 45 accomplishes

that in relevant part by providing that a nonparty may be required to produce documents only "at a place within 100 miles of where the [nonparty] resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A) (2013).[10] As the Second Circuit acknowledged with regard to a similar provision of Rule 45, "[t]he purpose of the 100 mile exception is to protect such witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest." *In re Edelman*, 295 F.3d 171, 178 (2002).

A fortiori, if nonparties should not be forced to incur the expense and difficulty of producing documents more than 100 miles from their workplaces or residences, they should not be compelled to shoulder the exponentially greater burdens associated with producing documents in numerous foreign jurisdictions. See, *e.g.*, *Miller* v. *Holzmann*, 471 F. Supp. 2d 119, 121 (D.D.C. 2007) (denying a motion to compel production of documents more than 100 miles from defendants' expert witnesses). Indeed, the existence of the 100-mile limitation itself demonstrates that Rule

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[10] This subsection of Rule 45 did not come into effect until December 13, 2013, but Rule 45 has always sought to protect nonparties from overly burdensome discovery. See Fed. R. Civ. P. 45 advisory committee's notes (noting that one of the purposes of the revisions was to "clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence"); see also *Century Sur. Co.* v. *Master Design Drywall, Inc.*, No. 09-cv-0280, 2010 WL 2231890, at *1 (S.D. Cal. June 2, 2010) ("Underlying the protections of Rule 45 is the recognition that 'the word non-party serves as a constant reminder of the reasons for the limitations that characterize third-party discovery.'") (quoting *Dart Indus. Co.* v. *Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980)).

45 does not remotely contemplate foreign discovery directed to a nonparty. It is inconceivable that the drafters of the Rules would have wanted to prevent nonparties from having to travel more than 100 miles, but would have accepted that nonparties could be forced to search for and produce documents in foreign countries all over the world.

b. *Rule 69.* The court of appeals did not address Rule 45, but held instead that the discovery at issue here is authorized by Rule 69 and New York state law. See Pet. App. 15. The court erred, however, in concluding that Rule 69 permits any and all post-judgment discovery so long as it is "calculated to assist in collecting on a judgment." *Id.* at 13. Rule 69 authorizes discovery in post-judgment proceedings only insofar as otherwise "provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). Respondent pursued discovery only under Rule 45, and as explained above, that rule does not permit federal courts to order nonparties to conduct extraterritorial discovery. And respondent did not invoke New York state law, so this case does not present the question of whether New York provides any procedure that would authorize the discovery at issue here.[11]

Nor should Rule 69 be interpreted to set aside the express limitations on nonparty discovery in Rule 45. Not only does Rule 69 incorporate the limitations

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[11] New York courts have denied similar discovery pursuant to the "well-established separate entity rule" under which "each branch of a bank is treated as a separate entity, in no way concerned with accounts maintained by depositors in other branches or at a home office." *Ayyash* v. *Koleilat*, 957 N.Y.S.2d 574, 580 (N.Y. Sup. Ct. 2012).

"provided in these rules," but the Federal Rules of Civil Procedure must be read as a coherent whole. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 353-354 (1981). Rule 69 thus should not be interpreted to permit what Rule 45 prohibits. See *id.* at 354 (declining to attribute "a schizophrenic intent to the drafters" of the Federal Rules by interpreting one rule to limit discretion that another rule conferred). Moreover, Rule 69 should not be interpreted to create a right that Congress has thus far declined to confer on litigants, *i.e.*, the right to extraterritorial discovery for foreign litigation. See *supra*, pp. 21-25. In effect, respondent is attempting to use U.S. discovery rules as an end-run around the foreign discovery rules that would otherwise apply to its future actions before foreign tribunals. But when the Federal Rules contemplate action being taken in foreign countries, they are careful not to unilaterally displace whatever foreign rules govern that action. See, *e.g.*, Fed. R. Civ. P. 4(f) (service of summons abroad), 28(b) (depositions abroad). And as explained below, in case there were any remaining doubt, at the least Rule 69 does not clearly indicate that it should be given extraterritorial effect as this Court's precedents require.

C. The Presumption Against Extraterritoriality Requires Interpreting Federal Law Not To Authorize Foreign Discovery From Nonparties For Use Only In Foreign Litigation

The various federal laws that are potentially applicable to this case—the FSIA, 28 U.S.C. 1781 to 1783, and Rules 45 and 69—do not permit U.S. courts to order nonparties to conduct extensive discovery in foreign countries. But to the extent that any of those laws is ambiguous, at a minimum none gives any

"clear indication of an extraterritorial application." *Morrison*, 130 S. Ct. at 2878; see *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (quoting *Foley Bros, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Those federal statutes and rules must therefore be presumed "to apply only within the territorial jurisdiction of the United States." *Morrison*, 130 S. Ct. at 2877 (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248); see *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) ("[N]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."). Indeed, applying the usual presumption against extraterritoriality is even more warranted in this context than in *Morrison*, because extending the reach of federal law here would interfere with the sovereignty of foreign nations. See *Kiobel*, 133 S. Ct. at 1667.

This case illustrates the reason for the presumption. Here, two nonparty financial institutions have been ordered to conduct extensive discovery in foreign countries. That discovery relates to a foreign sovereign's foreign assets—assets that the parties acknowledge are not subject to attachment or execution in the United States. That is a remarkable result: in the absence of any express authority to do so, U.S. courts have ordered bank branches in New York to gather documents overseas that can be of use, if at all, only in foreign litigation against a foreign sovereign. Moreover, compliance with these orders exposes the banks to potential civil and even criminal liability under foreign law. Imposing those types of extraterritorial burdens on nonparties does and should re-

quire a clear, affirmative indication from Congress. See *Morrison*, 130 S. Ct. at 2877 ("[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.") (internal quotation marks omitted). Congress has given no such indication here.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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Supreme Court of the United States

REPUBLIC OF ARGENTINA,
Petitioner

v.

NML CAPITAL, LTD.,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE & FORMER STATE DEPARTMENT OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, contains no provision granting immunity against discovery of foreign state property. What limits, if any, based on comity and reciprocity in foreign relations, should apply to discovery in enforcement of a valid FSIA judgment?

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INTEREST OF AMICI[1]

The Competitive Enterprise Institute (CEI) is a nonprofit organization dedicated to advancing the principles of individual liberty and free enterprise. CEI's interest in this case is to ensure that foreign states are fully accountable for their commercial contracts and that the restrictive theory of immunity embodied in the FSIA will not be rendered impotent by overly limited post-judgment discovery.

All of the individual *amici* on this brief served in the Department of State either as the Legal Adviser, the Counselor on International Law, or in other capacities. The individual *amici* are listed in Appendix A. Of particular relevance to the FSIA, John Norton Moore, the Counsel of Record on this brief, served as Counselor on International Law to the Department of State during the drafting of the FSIA in the early 1970s, and at that time participated both in the drafting of the law as submitted by the Executive to the Congress and in clearing the draft FSIA law through the interagency process within the United States government. Robert F. Turner served as national security adviser to Senator Robert P. Griffin (R. Mich.) when FSIA

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

was enacted in 1976 and was Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-1985. Davis R. Robinson and Judge Abraham D. Sofaer served as the Legal Adviser to the Department of State, respectively from 1981-85 and 1985-90.[2]

The *amicus* brief for the United States calls the Court's attention to the distinction in sovereign immunity law under the FSIA between jurisdiction for suit and jurisdiction for attachment and execution. We believe that this brief is deficient, however, in not also calling attention to the fundamental distinction in the FSIA between categories of property *per se* exempt from attachment and execution under international law (as principally set out in Section 1611 of the FSIA), and those not so limited but merely not available for execution or attachment in the United States (as principally identified by omission in Section 1610 of the FSIA). The United States should be encouraging all nations to live up to their commercial obligations. And, it should be encouraging full and effective application of the rule of law to breaches of those obligations. This includes, where the necessary commercial assets are not available in the United States for attachment and execution on a valid

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[2] Many of the *amici* have strong records of supporting Executive authority in foreign relations. Disputes concerning commercial activities of foreign states, however, have been entrusted to the courts under the FSIA and, in our opinion, there is no foreign policy interest of the United States served by preventing discovery in aid of judgment with respect to commercial property of foreign states, wherever located.

judgment, facilitating through discovery the identification of commercial assets held abroad to permit recognition and enforcement of the American judgment abroad.[3]

The *amicus* brief for the United States also fails to clearly separate the issue here, that of *scope of discovery under the FSIA*, from that of *scope of attachment and execution* under the FSIA. The thrust of the argument in the United States *amicus* brief concerns limitations on attachment and execution[4] and we take no issue with this discussion. But importantly, the reasons concerning limitations on attachment and execution with respect to commercial property under the FSIA are not the same as the reasons for permitting broader discovery with respect to commercial assets wherever they may be located. Discovery is part of the normal judicial process in the United States court system and the expectation of states under the restrictive theory of immunity is that once jurisdiction has been established they will be subject to the normal judicial process of the United States.

There is also an important national interest in support of discovery with respect to commercial assets wherever those assets may be located. The United States has a strong interest in enhancing effectiveness of its judgments through recognition

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[3] This brief solely addresses issues of comity and reciprocity for United States foreign relations in settings of post-judgment discovery under the FSIA. As such, it is a response to the *amicus* brief submitted by the United States.

[4] *See amicus* brief for the United States at 13-14.

and enforcement of American judgments in other nations wherever the commercial property of the responsible state may be located.

The evidence is overwhelming that states which follow the rule of law in their dealings perform better for their citizens than those which fail to do so.[5] For Argentina or other nations to default on the bonds which they have internationally marketed not only directly harms American and other investors but it raises the capital cost of Argentinian debt and directly harms the Argentinian people. Adhering to the integrity of an agreement is as essential for governments in their commercial dealings as it is for corporations and individuals. Equally important, when governments fail to live up to their commercial obligations, they should be subject to suit to enforce the rule of law in the interest of all parties—investors and the citizens of the state itself, both of whom have an important stake in the rule of law.

There is also an important rule of law interest in supporting effectiveness in enforcement of valid judgments against foreign states. Indeed, supporting

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[5] *See generally* WORLD SURVEY OF ECONOMIC FREEDOM, 1995-96 (Richard E. Messick ed., 1996) [Freedom House]; JAMES D. GWARTNEY & ROBERT A. LAWSON, ECONOMIC FREEDOM OF THE WORLD (1997); BRYAN T. JOHNSON & THOMAS P. SHEEHY, THE INDEX OF ECONOMIC FREEDOM (1995) [and subsequent annual reports]; GERALD SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH (1992); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). For a discussion of the broad range of indicia showing that nations adhering to democracy and the rule of law perform better for their citizens *see* JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 1-8 (2004).

respect for United States judgments is an important interest of the judiciary and the Nation.

States, of course, are not individuals or corporations and there are important reasons why certain classes of state property cannot and should not be subject to attachment or execution. These limited categories, as generally internationally accepted, include *first*, diplomatic and consular premises and property,[6] *second*, property of foreign states held in international organizations which are entitled to enjoy the privileges and immunities provided by the International Organizations Immunities Act (organizations such as the International Monetary Fund or the World Bank), *third*, property of a military character or under the control of a military or defense authority and intended to be used in connection with a military activity, and *fourth*, except as *explicitly waived*, property of a foreign central bank or monetary authority *held for its own account*.[7]

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[6] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T., T.I.A.S. No. 7502, Articles 21-24, 27 & 30; and Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, Articles 27, 30-33 & 35. Absolute immunity also extends to the residence of a Chief of Mission.

[7] *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 436 (ALI 1987) Comment C, § 460 ("Two types of property are absolutely immune from attachment, and the immunity is not subject to waiver: (i) assets of foreign states held in certain international organizations such as the International Monetary Fund or the World Bank (FSIA Section 1611(a)), and (ii) property of a military character that is used or intended to be used in connection with a military activity or is under the control of a military authority or defense agency (FSIA Section 1611(b)(2). Property of a foreign central bank or monetary authority *held for its own account* is also absolutely

To permit attachment or execution against diplomatic or consular premises or property interferes with an important international interest in effective communication between nations. Similarly, to permit such enforcement actions against accounts held in international organizations can undermine the functions assigned to such organizations, an effect going beyond the defaulting state and potentially harming the international interest in such organizations. Obviously to seek to attach or execute against military assets has grave potential for international conflict. Finally, to seek to attach or execute against central bank or monetary authority property *held by the bank or authority for its own account without explicit waiver* has potentially grave implications for economic stability and the functioning of such authorities.

The individual *amici* submitting this brief *urge that discovery not be permitted against the above categories of foreign state property exempt from attachment and execution under international law as specified in §§ 1611 and 1610(a)(5) (the proviso for diplomatic properties).* Since these categories of property are categorically exempt, except under the narrow exceptions set out in § 1611, there can be no attachment or execution against them in any

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immune from attachment unless *explicitly waived* (FSIA Section 1611(b)(1) (emphasis added))."

jurisdiction.[8] Thus, there could be no supplemental action in any other country based on recognition and enforcement of the American judgment that could either attach or execute against these assets. As such, discovery with respect to these categories of foreign state property would be futile. Moreover, the sensitivity of many of these categories of assets suggests high potential for interference in foreign policy and costs to comity and reciprocity. For example, it would be extremely costly for foreign policy and comity, with accompanying reciprocity risk to the United States, to permit attachment or execution against military assets of another state. Thus, for the classes of property as specified in Sections 1611 and 1610(a)(4)(B) of the FSIA which are categorically exempt from attachment and execution under international law we agree with the brief of the United States.[9]

In contrast to the above special categories that should remain exempt, however, there is no general international interest in exempting assets held for commercial activities or which are otherwise non-exempt. Indeed, that is the clear implication of the international reform removing commercial activities from immunity. There is simply no comity or

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[8] We believe that these provisions, setting out the United States view of exempt categories under international law, generally reflect contemporary international law.

[9] Importantly, however, property to be *per se* exempt under § 1611 or § 1610(a)(4)(B) must meet *all* the requirements for immunity in at least one of the exempt categories. Moreover, discovery should be flexible enough to defeat efforts to hide commercial assets though disguising them as exempt property.

reciprocity interest with respect to commercial property. The principal foreign relations interest at stake here is to encourage all nations to adhere to their commercial agreements; adherence that serves both the international investing community as well as the citizens of the lending state.

Amici seek to support the rule of law in the interest of all nations; a rule of law which includes holding governments to their commercial agreements. Doing so requires that we maintain a vigorous ability to subject the commercial activities of states to suit and enforcement while supporting a limited but essential state immunity from attachment and execution as set out in the above classes of categorically exempt property.

STATEMENT

The Foreign Sovereign Immunities Act was drafted in the Legal Adviser's Office of the Department of State in the early 1970s. It had two principal objectives. First, it was intended to codify the restrictive theory of state immunity in which states would henceforth be subject to legal process for their commercial activities. Second, it was responding to criticism both about fairness to litigants and costs to United States foreign policy when the Office of the Legal Adviser in the Department of State was making immunity decisions on a case-by-case basis. Henceforth, immunity decisions would be turned over to the courts. The old thinking of "absolute immunity" which the Act decisively rejected was fundamentally inconsistent with the rule of law. The Act reflected strong United States leadership in limiting this older rule of "absolute immunity," most importantly in codifying a commercial activities exception—which has clearly become the principally accepted international approach to immunity decisions. It is worth noting that it was the Department of State itself which drafted the original legislation, though the legislation subsequently has been broadened by the Congress, particularly with respect to waiving state immunity concerning certain terror attacks against Americans now codified in Section 1605(a)(7) of the FSIA. The Act also largely eliminated pre-judgment attachment, which had been the predominant pre-FSIA modality of obtaining jurisdiction, and it simultaneously set up a

system for post-judgment attachment, execution and satisfaction.

The two principal purposes of the Act are both reflected in Section 1602: "Findings and declaration of purpose." Thus, making a clear statement that under international law states are not immune with respect to their commercial activities and that their commercial assets may be levied upon for satisfaction of judgments against them, the FSIA provides:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.[10]

And, with respect to the purpose that henceforth immunity decisions should be made by the courts rather than the Legal Adviser's Office of the Department of State, this Section states:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of

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[10] 28 U.S.C. §1602.

> justice and would protect the rights of both foreign states and litigants in United States courts. . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.[11]

It is important to note that the Act, as drafted by the Department of State, is not simply codifying an American view of the commercial activity exception, it clearly affirms that "*under international law, states are not immune . . . . [concerning] their commercial activities . . . [and] their commercial property . . . .*"[12]

Consistent with the purpose of the Act to henceforth have immunity claims determined by the courts, the Act assumes that, except for special procedural provisions spelled out in the Act such as Section 1608 on service of process, the courts will apply normal court rules and procedures. Thus, Section 1606 provides as the general rule that: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[13] This includes discovery, which has no special limitations in the Act. According to the *Restatement (Third) of the Foreign Relations Law of the United States:*

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[11] 28 U.S.C. §1602.
[12] *Ibid.* §1606.
[13] *Ibid.*

> *Discovery.* Neither the Foreign Sovereign Immunities Act of the United States nor corresponding legislation in other states addresses the issue of discovery against foreign states. When a state is party to an action in a court of another state—whether as plaintiff or as defendant—all the normal procedures associated with adjudication in that court, including discovery and requirements for posting security, are applicable, except as expressly excluded. A state subject to suit under the restrictive theory, then, is subject to discovery in connection with such suit.[14]

Confirming this point that discovery, under the usual supervision of the court, is available pursuant to existing law, the House Report on the FSIA explains: "*The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate* in this area. . . .[15] The House Report goes even further and notes that "[A]ppropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery."[16] The *Restatement* strongly suggests from this House Report reference to Rule 37 that even a default

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[14] 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §451 Comment *c* (1987).

[15] H.R. Rep. No. 1487 (94th Cong., 2d Sess.) at 23 (1976).

[16] *Ibid.* (emphasis added).

judgment would be available for failure to comply with a discovery order.[17]

The *amicus* brief for the United States asserts that "[i]f Congress had wanted to authorize courts to issue discovery orders . . . . Congress would have said so expressly. But it gave no indication of any such intent."[18] With respect, the United States brief has it backward on the FSIA "comprehensive scheme." Congress in the FSIA made it clear in Section 1606 of the FSIA that, once "a foreign state is not entitled to immunity under Section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual . . . ."[19] The sections of the FSIA specifically cited by the Act here as the conditions precedent for normal judicial "manner and extent" in exercise of jurisdiction (that is, Sections 1605 & 1607) are those relating to jurisdiction over suit, not jurisdiction with respect to attachment or execution as set out in Sections 1609-1611. So Congress specifically left out as conditions precedent for normal exercise of jurisdiction any reference to the provisions concerning attachment and execution immunities. Moreover, in this same provision the Congress did address a limitation—that concerning punitive damages; so the Congress certainly understood that once jurisdiction over suit was met

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[17] I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 459 Comment *d* (1987).

[18] Brief for the United States as *Amicus Curiae* in Support of Petitioner, at 10.

[19] 28 U.S. Code § 1606. *See also* Res. Br. 4, 41.

the foreign state would be treated in the courts as any other litigant, with the exception of the punitive damage provisions spelled out in this same section.[20] Further, the intent of Congress gets even clearer when it is noted that the Congress not only specifically addressed discovery in the FSIA, but it specifically addressed "limitations on discovery," and the only limitation on discovery specified by Congress was on discovery against the United States, not discovery against foreign states.[21]

With respect to the new provisions on attachment and execution in aid of judgment the Act sets out two categories of restraints. The most important restraints, as set out in Section 1611 of the FSIA, are categorically exempt from attachment and execution except pursuant to the narrow exceptions spelled out in this Section.[22] They include:

- Property of a foreign central bank or monetary authority *held for its own account*, unless immunity is explicitly waived;
- Property of organizations entitled to the immunities provided by the International Organizations Immunities Act (including

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[20] *Ibid.*

[21] *See* 28 U.S.C. § 1605 (g) "Limitation on Discovery," applying such limitations in FSIA actions solely to discovery against the United States.

[22] These exceptions include the "explicit waiver" and "held for its own account" provisions concerning foreign central bank or monetary authority property.

> accounts of national governments in these organizations);
>
> Property of a military character or under the control of a military authority or defense agency and used or intended to be used in connection with a military activity.

Under Section 1609, the introductory provision on immunity from attachment and execution, the Act also exempts any category of property "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act . . . ."[23] This latter category includes diplomatic and consular premises or property as categorically exempted by the Vienna Convention on Diplomatic Relations[24] and the Vienna Convention on Consular Relations.[25] Moreover, diplomatic and consular properties are also specifically exempt from attachment as set out in Section 1610(a)(4)(B) of the FSIA—which provides an exemption for "property used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission . . . ."[26]

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[23] 28 U.S.C. § 1609.

[24] *See* Vienna Convention on Diplomatic Relations. Articles 21-24, 27 & 30.

[25] *See* Vienna Convention on Consular Relations. Articles 27, 30-33 & 35.

[26] 28 U.S.C. § 1610(a)(4)(B). Presumably this restriction appears in § 1610 rather than the categorically exempt property in § 1611 of the Act simply because it relates to immovable property situated in the United States which would otherwise be subject to attachment or execution in relation to a judgment establishing rights in property.

The second set of exceptions to immunity and attachment are principally dealt with in Section 1610 of the FSIA which includes property used by the foreign state or its agency or instrumentality for commercial activities in the United States. The careful construction of this section reflects that the categories of property that fall outside of Section 1610—such as commercial property used abroad—are not categorically exempt from attachment and execution under international law, but rather are categories excluded from attachment and execution in the United States based on perceived limitations on United States jurisdiction in attempting to attach or execute on commercial property located abroad. This jurisdictional nexus for the Section 1610 limitations on attachment and execution against commercial assets was well understood by the draftsmen of the FSIA and is reflected in the House Report which provides:

> [T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolutely immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. *It would conform the execution immunity rules*

> *more closely to the jurisdiction immunity rules.*[27]

These commercial properties, however, are presumably still available to satisfy judgments either under actions brought in the foreign states where such commercial property is located, or under United States judgments recognized and enforced in such foreign states. *But under the restrictive theory there is no basis for concluding that these properties used in commercial activities are under international law categorically exempt from attachment and execution.*[28] In this connection, consistent with the restrictive theory, Section 1602 of the FSIA states: "Under international law, states . . . commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."[29]

Importantly, if the FSIA purpose in holding states accountable for their commercial activities is to be effectuated, not only must the FSIA permit discovery with respect to their commercial property wherever located, but courts must also be permitted to retain adequate discretion in discovery to ensure that foreign states are not concealing their property

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[27] H.R.Rep. No. 1487 (94th Cong., 2d sess.) at 8 (1976) (emphasis added).

[28] Similarly, the FSIA itself makes it clear in numerous provisions of the § 1610 "exceptions to immunity from attachment or execution" that the question of "whether the property is or was involved in the act upon which the claim is based" is not part of any categorical immunity under international law.

[29] 28 U.S.C. § 1602.

through blanket assertions either of non-existence or that the property in question is within a class categorically exempt from attachment or execution. As such, it would seem appropriate to require a foreign state to support any assertion that discovery with respect to challenged property should be blocked because the property in question is in a class of property categorically exempt. This conclusion is also supported by the important reality that it is the foreign state that controls information as to the nature of the property in question. Perhaps an appropriate balance might be achieved by limiting discovery to non-exempt property but requiring the foreign state to provide an appropriate showing that any challenged property is non-exempt.[30]

The FSIA defines "commercial activity"[31] and there is a substantial jurisprudence[32] available under the FSIA as to what is "commercial activity." Indeed, the courts apply this test routinely in determining jurisdiction under the commercial activity exception to the FSIA, as set out in Section 1605(a)(2) of the FSIA.[33] As such, the test for determining whether property was or is being used for "commercial activity," and is thus subject to

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[30] According to Respondent's brief Argentina never sought to limit discovery to non-exempt categories such as military property. Res. Br. 45.

[31] 28 U.S.C. § 1603(d).

[32] *See, e.g., Argentina v. Weltover*, 504 U.S. 607, 612 (1992); *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 453 & Comment at 401-07 (1987).

[33] 28 U.S.C. § 1605(a)(2).

discovery in aid of enforcement, is well within usual judicial practice.

Finally, it should be noted that there is an additional route by which the commercial property of a foreign state might be subject to attachment and execution in the United States. That is—the recognition and enforcement in the United States of a foreign judgment against the foreign state. Comment *c* to Section 482 of the *Restatement of the Foreign Relations Law of the United States, Third* provides: "A foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another state."[34] And Comment *h* provides with respect to an action to enforce foreign judgments:

> [A]n action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum. The rationale behind wider jurisdiction in enforcement of judgments is that once a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it

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[34] 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482, Comment *c* (1987).

satisfied out of the judgment debtor's assets wherever they may be located.[35]

Assuming that the provisions of the FSIA apply to such recognition and enforcement of foreign judgments,[36] Section 1610 of the FSIA may embody different limitations than in the case of attachment and execution on a United States judgment. Thus, Section 1611 continues to provide a categorical bar against attachment and execution with respect to the included class of exempted property as set out above. But, in contrast, Section 1610 repeatedly uses the limiting language "upon a judgment entered by a court of the United States or of a State"—quite possibly leaving the category of commercial property unlimited by that section in relation to the enforcement of foreign judgments in the United States. Further, were the provisions of Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property[37] to be applied by a United States court in recognition and enforcement of a foreign judgment, the limitations on attachment and execution would be different than those set out in Section 1610 of the FSIA.

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[35] *Ibid.*, Comment *h*.

[36] This is arguably not clear under the FSIA. Possibly recognition and enforcement of foreign judgments against foreign states may be principally dealt with by application of state law, as is the usual case in recognition and enforcement of foreign judgments generally.

[37] *See* G.A. Res. 59/38, art. 21(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). This convention, which is not yet in force, is discussed *infra* at 26.

SUMMARY OF ARGUMENT

The plain language and core purpose of the FSIA permit discovery against the commercial property of foreign states in aid of enforcement of a valid United States judgment, wherever such commercial property is located.

The statutory language of Section 1606 of the FSIA is clear in establishing that once jurisdiction is present for suit that "the foreign state shall be liable *in the same manner and to the same extent as a private individual under like circumstances* . . . ."[38] This includes, as reflected in the legislative history, normal discovery under the supervision of the courts. Further, the FSIA legislative framework did not overlook the issue of discovery, for it specifically contains a limit on discovery—a limit that applies only to discovery against the United States.[39]

A core purpose of the FSIA is to hold states accountable through the judicial system, including effective enforcement, for their commercial activities. It also deliberately turned such accountability over to the courts to follow normal judicial procedures in subjecting the commercial activities of states to the rule of law. In this connection, the FSIA states clearly as a declaration of purpose: "[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon

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[38] 28 U.S.C. § 1606 (1976) (emphasis added).
[39] *Ibid.* § 1605(g) (1976).

for the satisfaction of judgments rendered against them in connection with their commercial activities."[40]

Comity and reciprocity are not harmed by discovery concerning the commercial property of foreign states, wherever located. There is no prohibition in international law on recovery against commercial property, as opposed to categories of property *per se* exempt from attachment or execution.[41] As such, states do not have justified expectations that their commercial property will be exempt from attachment or execution in enforcing judgments against them resulting from their commercial activities.[42] Moreover, under the

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[40] 28 U.S.C. § 1602 (1976). Moreover, the core immunity from attachment and execution provision of the FSIA, § 1609, provides immunity by its terms only to "the property in the United States of a foreign state." 28 U.S.C. § 1609. *See* Res. Br. 9. *Only the categorically exempt properties set out in § 1611 of the FSIA are not limited by the "property in the United States" language.* At the least this language suggests that the Congress had no intent to limit execution and attachment against commercial assets abroad pursuant to recognition and enforcement of American judgments abroad.

[41] Even prior to the FSIA the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 Reporters' Note 2, "*Immunity from execution,*" at 215-16, at 216 (1965), pointed out that cases in foreign states were permitting levy on property of a state connected with its "private acts;" acts today identified as "commercial activities."

[42] This is particularly true for Argentina, which certainly understands its exposure in United States courts with respect to commercial activities. *See, e.g., Argentina v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Argentina v. Weltover*, 504 U.S. 607 (1992). Moreover, the commercial activity in question is one in which Argentina specifically agreed, without

restrictive theory of immunity there is no justifiable expectation that a state will not be subject to full judicial process once it is established that a claim has no immunity. As such, there is no comity issue in subjecting the commercial property of foreign states to discovery in aid of enforcement of a valid United States judgment, wherever such property may be located.

Rather than harming comity and reciprocity interests of the United States, permitting discovery in aid of judgment with respect to commercial property of foreign states, wherever such property may be located, serves comity and reciprocity in numerous ways. These include encouraging states to adhere to their word in commercial activities; enhancing global commerce; furthering the restrictive theory of immunity championed by the United States; protecting the integrity of judgments issued by United States courts;[43] and, most broadly, supporting the rule of law in international affairs.

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limitation, to be subject to "the courts of New York." *NML Capital v. Argentina*, 727 Fed. 3d. 230, 237 (2d Cir. 2013).

[43] The Second Circuit apparently believes that the behavior of Argentina in this case poses a direct challenge to the authority of the Court. It stated that the creditors of Argentina "have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. . . ." *NML Capital v. Argentina*, 727 Fed. 3d. 230, 241 (2d. Cir., 2013). Since granting comity here would be a voluntary setting aside of jurisdiction in the interest of fairness and good relations, it would certainly be a relevant factor for this Court to consider that the Second Circuit believes that Argentina has sought to "defy" the judgment of the Court," behavior hardly demonstrating "comity" on the part of Argentina.

ARGUMENT

A. Discovery Under the FSIA in Enforcing an American Judgment Against Commercial Assets, Not Otherwise Exempt, Should Not Be Limited by the FSIA Restrictions on Attachment and Execution Related to Use of the Property for Commercial Activities in the United States as Set Out in Section 1610 of the FSIA; Restrictions Which Simply Reflect Voluntary Jurisdictional Restraints.

There is a fundamental distinction between property that is categorically exempt from attachment and execution under international law, and commercial property excluded under the FSIA from attachment and execution for jurisdictional considerations.[44] There is no prohibition in international law to attachment or execution against commercial properties of a state to enforce a judgment rooted either in waiver in relation to a commercial activity or simply a commercial activity exception to immunity. Thus, there should be no negative effect on United States foreign policy or comity or reciprocity interests of the United States in permitting discovery concerning such commercial properties whether located in the United States or elsewhere. The United States has fully accepted the restrictive theory limiting immunity with respect to

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[44] It is unclear whether the Section 1610 limitations would even apply when United States courts are recognizing and enforcing a foreign judgment.

commercial activities, and including recovery against commercial properties.

The principal restrictions established (by omission) in Section 1610 of the FSIA are voluntary in nature, intended to limit attachment and execution in the United States to property over which the United States has clear jurisdiction. They do not reflect categorical prohibitions under international law against attachment or execution of foreign assets such as those set out in Sections 1611 and 1610(a)(4)(B) (diplomatic or consular properties). *But when the issue is discovery in enforcement of a valid judgment where jurisdiction for suit against the foreign state has already been established, then no issue of jurisdiction under international law arises.* This is a fundamental distinction between the issue of discovery and the issue of attachment and execution. Clearly when non-immunity against suit is established, national courts have jurisdiction to order discovery and apply other normal judicial procedures and practices against the foreign state. As the FSIA clearly states in Section 1606 "Extent of Liability"—when the foreign state is not entitled to immunity under the Act "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[45] It would make no sense, then, to limit *discovery in a United States court, where jurisdiction over discovery is present,* to categories of assets excluded from attachment and execution for jurisdictional reasons.

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[45] 28 U.S.C. § 1606.

The *amicus* brief of the United States is also telling in pointing out that the United Nations Convention on Jurisdictional Immunities of States and Their Property[46] recognizes as immune from execution "[c]entral bank, military, and diplomatic property."[47] Sadly, however, the United States brief fails to note that Article 10 of the Convention provides that there is no sovereign immunity for commercial transactions.[48] Moreover, Article 19 of the Convention, which regulates post-judgment attachment and execution in the courts of a third country, specifically permits attachment against commercial property located in the third country.[49] This Convention is compelling evidence that there is no international comity or reciprocity problem with respect to post-judgment discovery concerning commercial property located abroad, *precisely the point of this amicus brief!*

Discovery in aid of enforcement of a United States judgment concerning commercial properties abroad could be of considerable importance to a judgment holder through foreign recognition and

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[46] *See* G.A. Res. 59/38, art. 21(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). This Convention is not in force and remains controversial in part.

[47] *Amicus* brief of the United States, at 28. The United States brief goes on to note that "the Convention's protections . . . [which specifically exclude any absolute bar against post-judgment execution on commercial property in third countries] reflect accepted international principles and practices regarding foreign-state immunity." *Ibid.*

[48] G.A. Res 59/38, *supra* note 46, art. 10.

[49] *Ibid.* art. 19.

enforcement of the American judgment. An American judgment holder has a strong interest, not only in enforcing the judgment in the United States, but also in recognition and enforcement of the American judgment in any jurisdiction abroad where the foreign state's commercial assets may be located.

Absent discovery in the American action it may not be evident to the judgment holder where it would be useful to seek recognition and enforcement of their judgment. Given the expense in filing such actions it simply is not practical to conduct a fishing expedition through filing actions in multiple jurisdictions abroad in search of the foreign state's commercial assets. As such, broad discovery in the United States with respect to the commercial assets of the responsible state, wherever such assets might be located, is an important element in the effectiveness of the American judgment. Such discovery is even more important where a sophisticated scheme to sequester assets abroad is suspected.[50]

The *amicus* brief of the United States points out the seriousness of the problem for the United States

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[50] Nothing in the FSIA text or legislative history suggests that the Congress of the United States sought to limit the import of American judgments under the FSIA with respect to recognition and enforcement abroad, an important element of effectiveness. Nor is post-judgment discovery, addressed to a foreign state which is already fully subject to the jurisdiction of an American court, an "extraterritorial," application of the FSIA, whether or not discovery is limited to property in the United States. *See* Res. Br. 44-45.

judgment holder absent permitted discovery in the United States concerning assets abroad. The brief states: "Notably, because other jurisdictions generally allow much more limited discovery than is available in the United States . . . respondent likely could not obtain the discovery it seeks in the courts of many foreign states."[51] This difficulty would be added to the even greater difficulty of not even knowing in which of more than 190 other judicial systems to begin an enforcement action, absent knowledge as to the country location of available commercial property.

B. The Department of State Has Overstated Comity and Reciprocity Concerns with Respect to Discovery, if Such Discovery is Limited to Property Related to Commercial Activities.

Quite simply, when a foreign state enters the commercial arena to do business it does so without the immunity it might otherwise possess; and this is so both under the FSIA and under international law.[52] Accordingly, there is no harm to United States foreign policy in holding states accountable for their commercial activities, including recovery against their commercial assets. Comity, a principle

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[51] *Amicus* brief of the United States at 26.

[52] One of the Department of State's leading international experts in this area has written: "[G]overnments are subject to essentially the same jurisdictional rules as private entities in respect to their commercial transactions. . . . Today, the propriety of providing for the juridical settlement of such claims has gained worldwide acceptance." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and their Property*, 99 AM. J. INT'L L. 194, 194-95 (2005).

of international law respecting the interests of other states in the exercise of jurisdiction, is simply not implicated where a United States court is facilitating implementation of the restrictive theory of immunity. As such, robust discovery of commercial assets in aid of enforcement of a United States judgment rooted both in commercial activities and in waiver poses no comity concern *whether those assets are located in the United States or abroad.*

Further, it is well understood that once a national court has jurisdiction pursuant to an exception to immunity, such as waiver or commercial activity, then the foreign state is subject to the normal judicial process of that court. In the United States that normal judicial process includes discovery. The FSIA makes this clear in Section 1606 "Extent of liability" when it provides in settings where the foreign state is not entitled to immunity that: ". . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[53] Accordingly, at least with respect to commercial assets implicated under the restrictive theory of immunity, there is no expectation under international law that a foreign state would not be subject to robust discovery in support of enforcement.

One of the core purposes of the FSIA, to take immunity decisions out of the Department of State and transfer them to the courts, was rooted in

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[53] 28 U.S.C. §1606.

American foreign policy experience. It was found that United States foreign policy would be implicated less by foreign states understanding that henceforth they would be subject to the rule of law in United States courts rather than a process of case-by-case pleading by the foreign state with the Department of State and then the foreign state taking offense whenever immunity was rejected.

Similarly, discovery of commercial assets, whether such assets are located in the United States or abroad, in support of enforcement of a valid judgment against a foreign state for defaulting on bonds the foreign state marketed in the United States, a commercial activity,[54] and with immunity waived in aid of such marketing, does not pose a problem of reciprocity in foreign relations for the United States. The United States has never defaulted on its bonds and there is virtually no chance that the United States, with the world's reserve currency, and as the world's financial safe haven of choice, will default on its bonds. Moreover, the United States routinely adheres to court judgments concerning monetary damages and it would be an exceptional case were it not to do so. It is also likely, were the circumstances reversed and the United States had borrowed money in Argentina under the stipulation that immunity was waived and disputes would be resolved under Argentinian law,

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[54] "Borrowing Money" was listed in the House Report on the FSIA as an example of a "commercial activity." H.R. Rep. No. 1487, 94th Cong., 2nd Sess. at 16.

that Argentinian courts would not assist the United States in defrauding Argentinian investors. Accordingly, the facts of this case simply do not implicate reciprocity concerns for the United States.[55] The facts of this case, however, do implicate the United States' interest in encouraging all states to adhere to their commercial obligations, particularly in something as important as the sale of bonds.

Even prior to the FSIA it was common for treaties of friendship, commerce and navigation to waive immunity for commercial or business activities, including both immunity from suit and execution of judgment. For example, the Treaty of Friendship, Commerce and Navigation with the Netherlands provided in Article XVIII(2):

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities, within the territories of the other Party claim or enjoy, either for itself or for its property, immunity therein from taxation, *suit, execution of judgment or other liability* to which privately owned and

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[55] Respondent's brief summarizes the range of factors present in this case which hugely limit reciprocity concerns for the United States. Res. Br. 39.

> controlled enterprises are subject therein.[56]

Moreover, while these FCN treaties waived immunity for commercial activities, including both suit and execution of judgment, they contained no specific limitations on execution against commercial assets held abroad as is created by Section 1610 of the FSIA. This FCN practice does not suggest a comity or reciprocity concern with respect to discovery against commercial assets in aid of enforcement of an American judgment, whether these assets are located in the United States or abroad.

Of course, as previously discussed, discovery with respect to property categories which are *per se* exempt under international law from either attachment or execution, as set out in Section 1611 of the FSIA, or pursuant to treaty obligations of the United States (for example, military equipment or diplomatic premises), *would* present comity and reciprocity concerns for the United States. Since the scope of discovery under the Federal Rules of Civil Procedure is under the control of the court such overly broad discovery can easily be controlled by the court.

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[56] Treaty of Friendship, Commerce and Navigation with the Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942, 285 U.N.T.S. 231 (1958) (emphasis added). *See also* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 456 "Waiver of Immunity," Comment *c* "*Waiver by International Agreement.*" According to the *Restatement:* "Immunity clauses in pre-1976 FCN treaties accomplished what the Foreign Sovereign Immunities Act achieved by statute." *Ibid.*

C. Principles of Comity and Reciprocity Will Be Served, Rather Than Harmed, By the Courts Retaining an Ability to Fashion Discovery Under the FSIA in Support of Enforcement Against Commercial Property.

Excluding property categorically exempt under international law from attachment or execution, the United States has strong comity and reciprocity interests in ensuring that states adhere to their international agreements, including their agreements with non-state parties. Thus, the United States has an interest—including a foreign policy interest—in ensuring that states comply with their agreements. Indeed, this is *the* core principle of international law; *pacta sunt servanda*. The United States has an interest, including a foreign policy interest, in enhancing effectiveness of the restrictive theory of immunity; a theory that strongly supports global commerce. The United States has an interest, including a foreign policy interest, in broadly ensuring enforcement of valid judgments as an essential element of the rule of law. Indeed, the United States also has an interest, including a foreign policy interest, in encouraging foreign states to respect judgments of United States courts. And the United States has an interest, including a foreign policy interest, in *justice*[67]; an interest that

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[67] Section 1602 of the FSIA begins by reciting that "[t]he Congress finds that the determination by United States' courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of *justice* . . . . [emphasis added.]" 28 U.S.C. § 1602. It is a fundamental principal of justice, reflected in the writings of Blackstone, that

surely includes responsibility of a state to pay its debts.

The *amicus* brief for the United States specifies in footnote 2 "The United States does not condone a foreign state's failure to satisfy the final judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina should normalize relations with its creditors, both public and private."[58] The United States would be more effective in realizing these objectives were it to argue more narrowly to the Court with respect to the permitted scope of discovery for purposes of attachment and execution under the FSIA and support discovery concerning the commercial property of defaulting foreign states whether that property is located in the United States or abroad.

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every legal right must have a legal remedy. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768). Chief Justice John Marshall made the same point thirty-five years later in *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The Chief Justice wrote that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and he warned that a government cannot be called a "government of laws, and not of men . . . . if the laws furnish no remedy for the violation of a vested legal right." *Ibid.*

[58] Brief for the United States as *Amicus Curiae*, note 2, at 6.

D. The FSIA, a United States Initiative Supporting the Rule of Law, Should Not Be Limited by the Courts to Undermine Its Principal Legislative Purposes in Holding States Accountable for Their Commercial Activities and In Transferring Immunity Decisions to the Courts.

The interest of the United States in promoting the rule of law globally, as well as the core purposes of the FSIA, support an interpretation to limit immunity concerning commercial activities. As has been seen, there is no comity or reciprocity interest implicated by permitting discovery in aid of a judgment with respect to the commercial assets of a foreign state, wherever those assets may be located. For the restrictive theory of immunity is widely accepted internationally and states have no justifiable expectation that their property used in commercial activities will not be subject to the rule of law.

Moreover, there are strong United States foreign policy interests supporting robust enforcement of judgments issued by United States courts against the commercial assets of foreign states. A pattern of empty judgments, frustrated through systematic non-compliance by a foreign state, undermines the rule of law. Permitting a robust discovery in aid of judgment also supports the principal purposes of the FSIA; which are to codify the restrictive theory of immunity and to turn immunity decisions over to the courts.

FSIA contains no legislative restriction concerning discovery against a foreign state once jurisdiction is initially established. As such, at least the plain meaning of the FSIA as a legislative act is that foreign states are not immune from discovery. Any judicial fashioning of parameters for discovery implementing this plain legislative framework should be narrowly crafted to support the clear purposes of the Act as textually set out in Section 1602 of the Act, to support judgments issued by American courts under the FSIA, and to promote the rule of law internationally; a major United States foreign policy objective.

The commercial assets of foreign states should not be immune from discovery, wherever such assets may be located. To hold otherwise would be to undermine an important mechanism for enforcement of judgments; that is the ability of the judgment holder to seek foreign recognition and enforcement of their United States judgment. Effectiveness in such foreign recognition and enforcement turns inevitably on knowledge as to where the foreign state's commercial assets are located. That, in turn, supports the centrality of adequate discovery for effective enforcement of judgments entered by United States courts under the FSIA.

Courts must also be permitted to retain adequate discretion in post-judgment discovery under the FSIA to ensure that foreign states are not concealing their property through blanket assertions either of non-existence or that the property in question is

within a class categorically exempt from attachment or execution. Indeed, in seeking to fashion discovery orders in support of final judgments, District Courts are likely to encounter a diversity of levels of compliance. Some governments may be entirely cooperative while others may secretly seek to deceive the court or openly flaunt its authority. Sometimes substantial information will be available about the location of commercial assets, while other settings may reflect sophisticated efforts to evade court orders through a veil of secrecy. This Court should leave adequate flexibility in the scope of permitted discovery for District Courts to deal with an expected range of cooperation. Under the FSIA, commercial activities of foreign states are subject to suit in United States courts. The United States should not unilaterally disarm a normal and important power of the courts in ensuring compliance with FSIA final judgments.

Ultimately the FSIA is about ensuring that states are subject to the rule of law in their commercial dealings. For this Court to hold that foreign states are subject to post-judgment discovery with respect to their commercial property, wherever located, both serves that purpose and, as well, carries out the plain meaning of the Act.

CONCLUSION

The judgment of the Court of Appeals supporting an order of discovery should be affirmed as it applies to the commercial property of Argentina, wherever such property may be located.

Respectfully submitted,

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March 30, 2014

APPENDIX A

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-842

IN THE
Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FAMILY MEMBERS AND ESTATES OF VICTIMS OF STATE-SPONSORED TERRORISM AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are family members and estates of victims of terrorism. *Amici* either hold an outstanding judgment issued by a U.S. court against a state sponsor of terrorism or are currently litigating claims in a U.S. court against a state sponsor of terrorism.

Amici Beverly Burnett, Sylvia and Veronica Carver, Peter Gadiel, and Joan Molinaro lost family members in the terrorist attacks of September 11, 2001. Ms. Burnett's son, Tom Burnett, Jr., was one of the heroes of Flight 93 who stormed the cockpit to confront the terrorists, resulting in the plane's crash in Western Pennsylvania. The Carvers' sister, Sharon, was one of the 58 passengers on American Airlines Flight 77, which Al Qaeda hijackers crashed into the Pentagon. Mr. Gadiel's son, James, died while working at the World Trade Center, and Mr. Gadiel is now President of 9/11 Families for a Secure America. Ms. Molinaro is the mother of Carl Molinaro, a New York City firefighter who died evacuating survivors from the World Trade Center. These *amici* are now pursuing a civil action against Sudan (as well as other defendants) for its role in funding Al Qaeda.

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have either been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

Amici Livingstone Madahana, Valerie Nair, Titus Wamai, and the estate of Adams Titus Wamai are family members (or the estate) of Americans killed in the 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. These *amici* have obtained a judgment against Sudan and Iran for those nations' roles in supporting the Al Qaeda terrorists responsible for the embassy bombings, which killed 224 people and injured thousands more. *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 157 (D.D.C. 2011).[2]

Amici Mary Neil Wyatt, Daniel Wyatt, Michelle Brown, and Amanda Lippelt, are family members of the late Ronald Wyatt, who has abducted and held hostage by the Kurdistan Workers Party in 1991. *See Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 220–21 (D.D.C. 2012). A district court held Syria liable based on its support of this terrorist organization and awarded $38 million in compensatory damages and $300 million in punitive damages to these *amici* and family members of another abductee. *Id.* at 231–33.

Amici Shlomo and Galit Leibovitch, together with their three surviving children and the estate of their deceased child, sued Syria and Iran for those nations' roles in supporting the Palestinian Islamic Jihad terrorist group. In 2003, these terrorists ambushed the Leibovitch family with assault weapons in Israel, killing one of the Leibovitch children and

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[2] Damage amounts are to be determined by a special master. *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 157 (D.D.C. 2011).

wounding another. *See Leibovitch v. Syrian Arab Republic*, 2011 WL 444762 at *4–5 (N.D. Ill.). A district court awarded the family $32 million in compensatory damages and $35 million in punitive damages. *See id.* at *10–11; Amended Order at 24, *Leibovitch* (No. 1:08-cv-01939) (Mar. 31, 2014).

As plaintiffs attempting to satisfy outstanding judgments against terrorist states, or expecting to do so in the future, *amici* have a unique understanding of the importance of post-judgment discovery in aid of execution. The Court's decision in this case will affect *amici*'s ability to recover damages from sovereign states that routinely and brazenly seek to evade responsibility for the catastrophic injuries they have inflicted through acts of terrorism.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Republic of Argentina urges this Court to adopt a rule that sharply limits the traditional scope of post-judgment discovery, even in cases where the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, undoubtedly withholds jurisdictional immunity from the foreign state. The effects of such a rule would be significant, extending well beyond the breach-of-contract suit at issue here. Indeed, if Argentina can avoid post-judgment discovery in this case, state sponsors of terrorism can likely avoid post-judgment discovery as well.[3] Interpreting the FSIA to assist terrorist states in avoiding their

[3] Four nations (Cuba, Iran, Sudan, and Syria) are currently designated by the United States as state sponsors of terrorism.

obligations to pay billions of dollars in judgments would run directly counter to Congress's efforts to make these states pay for their actions, and exacerbate the already acute difficulty victims face in collecting on judgments against state sponsors of terror-terrorism. Nothing in the text, structure, or purpose of the FSIA suggests that Congress intended this result.

I. A. *Amici* are among thousands of Americans who have lost family members to state-sponsored terrorism. Since 1996, Congress has passed a number of amendments to the FSIA to empower terrorism victims and their families to sue state sponsors of terrorism in U.S. courts. These amendments not only withdraw jurisdictional immunity from suit in U.S. courts, but also create a federal cause of action against state sponsors of terrorism. As a result of these amendments, many terrorism victims and their families have successfully sued foreign states, obtaining judgments entitling them to billions of dollars in compensatory and punitive damages.

B. Congress has also amended the FSIA to address the unique difficulties that terrorism victims face in enforcing judgments against state sponsors of terrorism. *First*, because of restrictions placed on terrorist states by U.S. sanctions laws, these states maintain few, if any, attachable assets in the United States. *Second*, terrorist states maintain secret (and complex) financial structures to keep their assets hidden and beyond the reach of both U.S. regulators and judgment creditors. *Third*, terrorist states typically cannot be compelled to comply with discovery

orders because, in nearly all circumstances, these states reject the authority of U.S. courts and refuse to appear in domestic courts.

Congress has addressed this problem by amending the FSIA to assist victims of terrorism in collecting judgments. These amendments have permitted attachment of diplomatic property and blocked assets, authorized pre-judgment attachment through the filing of a notice of *lis pendens*, and even required the Secretary of State and Secretary of the Treasury to assist victims in finding and attaching the assets of state sponsors of terrorism.

These amendments, while helpful, are not a complete solution to the collection problems faced by terrorism victims. Nor is there any reason to think that Congress intended these amendments to provide the exclusive method for satisfying judgments in terrorism-related cases. As Congress was well aware, the total amount of blocked and attachable assets within the United States is far from sufficient to satisfy all judgments in terrorism cases. Given this backdrop, the only reasonable inference to draw from the absence of an amendment expressly allowing for post-judgment discovery is that Congress understood that this discovery was already available under the Federal Rules of Civil Procedure.

II. This Court should decline Argentina's invitation to create an immunity from post-judgment discovery, and instead hold that the Federal Rules of Civil Procedure apply to the discovery at issue here. Such an immunity would be inconsistent with the text and structure of the FSIA, and it would frus-

trate Congress's efforts to assist terrorism victims in satisfying their judgments against foreign states.

A. The Federal Rules of Civil Procedure apply unless a federal statute expressly preempts them in a given case. Although the FSIA provides for various departures from standard procedures under the rules—including a provision allowing courts to stay discovery requested from the *U.S. government*—the statute provides no immunity from post-judgment discovery for foreign sovereigns. Congressional silence on post-judgment discovery thus dictates that the normal rules of discovery apply in FSIA cases.

B. An immunity from post-judgment discovery would plainly be at odds with the purpose of the FSIA's terrorism provisions. This immunity would frustrate Congress's intent to assist victims of terrorism, making it all but impossible for them to attach a terrorist state's assets. Congress has taken extraordinary steps to assist terrorism victims in collecting judgments against state sponsors of terrorism. It is inconceivable that, despite enacting these provisions, Congress intended to prevent terrorism victims from taking the same post-judgment discovery provided to plaintiffs in an ordinary civil case. The absence of a provision expressly addressing post-judgment discovery is powerful evidence that Congress understood that discovery procedures were already available to terrorism victims and that an immunity from post-judgment discovery does not exist.

ARGUMENT

I. Congress Has Repeatedly Amended The FSIA To Assist Terrorism Victims Without Ever Suggesting That Foreign Sovereigns Enjoy Immunity From Post-Judgment Discovery.

As originally enacted, the FSIA generally provided state sponsors of terrorism (like other foreign states) with both jurisdictional immunity from suit in U.S. courts and immunity from attachment of property in the United States. 28 U.S.C. §§ 1604, 1609. The effect of these provisions was to allow foreign states to assist in terrorist acts that injured and killed Americans without any fear of being forced to answer for their conduct in U.S. courts. To address this problem, Congress has repeatedly amended the FSIA, creating terrorism-related exceptions to both the jurisdictional and attachment immunities. In so doing, Congress has never suggested that state sponsors of terrorism enjoy the sort of implicit immunity from post-judgment discovery that Argentina seeks.

A. The FSIA Addresses The Problem Of State-Sponsored Terrorism By Allowing Suits Against Terrorist States.

Amici are among the many thousands of Americans who have been injured or killed, or have had family members injured or killed, by state-sponsored terrorism. Until the mid-1990s, *amici* had little hope of holding foreign states accountable for supporting terrorism. Because these governments were immune from suits in U.S. courts under the

FSIA, they could sponsor terrorist attacks on Americans with little fear of ever facing liability for the damage they caused.

That changed in 1996. In the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added an exception to the FSIA's general grant of jurisdictional immunity, giving U.S. courts jurisdiction over civil suits against state sponsors of terrorism. *See* Pub. L. No. 104-132, Title II, § 221, 110 Stat. 1214 (Apr. 24, 1996) (codified at 28 U.S.C. § 1605(a)(7)). In the same year, Congress also enacted a provision, known as the Flatow Amendment, to provide U.S. citizens with a federal cause of action against officials and agents of terrorist states. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Title I, § 101(c), 110 Stat. 3009-172 (Sept. 30, 1996) (codified at 28 U.S.C. § 1605(a)(7)). The Flatow Amendment exposed terrorist states to liability not only for compensatory damages, but also for punitive damages, a level of sovereign liability not afforded by the FSIA in any other circumstance. *See id.* § 1605A(c)(4).

In one of the first cases under these new provisions, the family of Alisa Flatow, the victim for whom the Flatow Amendment is named, successfully sued Iran for its role in Alisa's death. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D C. 1998).[4] The court held Iran "indirectly liable" for the

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[4] Alisa Flatow was a 20 year-old college student on a study abroad program in Israel at the time of her death. She was fatally injured when a suicide bomber crashed a van full of explosives into a public bus on which she was a passenger. Flatow (continued...)

death "under the principles of *respondeat superior* and vicarious liability," and awarded the Flatow family $22.5 million in compensatory damages and $225 million in punitive damages. *See id.* at 5, 25-26.

Following *Flatow*, other victims also successfully litigated claims against terrorist states,[5] but in 2004 these suits were called into question by the D.C. Circuit's decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). The D.C. Circuit held that AEDPA's amendments to the FSIA created a federal cause of action only against foreign state officials and agencies, but not against the foreign sovereign itself. *See id.* at 1033. As a result of this ruling, plaintiffs pursuing claims against terrorist states could not rely on the Flatow amendment, but instead were forced to plead state-law wrongful death or tort claims. *See In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 46 (D.D.C. 2009). While this proved no obstacle to many victims, others had their suits dismissed because the applicable state law did not provide a cause of action. *See, e.g., Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44–45 (D.D.C. 2007) (no cause of action under Pennsylvania or Louisiana law).

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died after undergoing hours of emergency head surgery. *See id.* at 6–8.

[5] *See, e.g., Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286 (D.D.C. 2003); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002).

Congress responded to *Cicippio-Puleo* by amending the FSIA to more clearly provide a cause of action against foreign states. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3 (Jan. 28, 2008) (codified at 28 U.S.C. § 1605A) (allowing suits against "[a] foreign state that is or was a state sponsor of terrorism," as well as against "any official, employee, or agent of that foreign state"). This amendment also expanded the class of victims who can bring suit under the FSIA to include non-citizen members of the U.S. armed forces and non-citizen government employees and contractors. *Id.* Congress also revived victims' claims that had been dismissed prior to the amendment. *See* 28 U.S.C. §§ 1605A(a)(2)(B); 1605A(a)(2)(A)(i)(II).

Congress's repeated amendments to the FSIA have permitted *amici* and many other Americans to successfully litigate claims against foreign sovereigns for supporting terrorist attacks on U.S. citizens. For example, *amici* Shlomo and Galit Leibovitch, along with their three surviving children and the estate of their deceased child, have obtained a judgment against Iran and Syria for a terrorist ambush on the family, which killed one child and injured another. *See Leibovitch*, 2011 WL 444762 at *10–11; Amended Order at 24, *Leibovitch* (No. 1:08-cv-01939) (Mar. 31, 2014). *Amici* Mary Neil Wyatt, Daniel Wyatt, Michelle Brown, and Amanda Lippelt have obtained a judgment against Syria for its role in supporting the terrorists who abducted and held hostage Ronald Wyatt. *See Wyatt*, 908 F. Supp. 2d at 231-33.

Many other cases are pending in federal courts, including suits seeking to hold foreign states accountable for their role in the terrorist attacks of September 11, 2001. For example, *amici* Beverly Burnett, Sylvia and Veronica Carver, Peter Gadiel, and Joan Molinaro lost family members in the attacks that day. Together with other victims, these *amici* are now pursuing a civil action against Sudan (as well as other defendants) for its role in funding Al Qaeda.

Congress's amendments to the FSIA have made foreign states accountable for their support of terrorist activities that injure or kill U.S. citizens. As of 2008, terrorism victims had obtained more than $19 billion in judgments against state sponsors of terrorism. *See* Congressional Research Service, *Suits Against Terrorist States By Victims Of Terrorism* 7 (Aug. 8, 2008). That total has grown considerably in recent years and will continue to grow in the future.

B. The FSIA Assists Victims Of State-Sponsored Terrorism In Enforcing Judgments Against Foreign Sovereigns.

Obtaining judgments against state sponsors of terrorism is only the beginning of the long process of achieving a measure of justice for victims' families. Although terrorist states are subject "to sweeping liability," the "proverbial elephant in the room . . . is the fact that these judgments are largely unenforceable" because of various practical and legal obstacles plaintiffs face in recovering damages. *In Re Islamic*

Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 122. But far from ignoring this problem, Congress has addressed it by passing numerous measures to assist victims in enforcing their judgments.

1. Plaintiffs In Terrorism Cases Face Unique Difficulties In Recovering Judgments.

Amici and other plaintiffs in terrorism cases face unusual challenges in enforcing civil judgments, difficulties that go beyond the ordinary obstacles to collection from sovereign states.[6] Family members of terrorism victims face significant obstacles that arise both from the U.S. sanctions regime that excludes state sponsors of terrorism from U.S.-connected business dealings and from the illicit nature of the activities of terrorist states. As a result, "the vast majority of victims have not received compensation of any kind," leading one court to lament that, despite substantial adverse judgments, state sponsors of terrorism have "not been held accountable." *See In*

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[6] As evidenced by the facts of this case, enforcing a civil judgment against a foreign sovereign unwilling to satisfy the judgment is always difficult. The FSIA generally prohibits attachment of a sovereign's assets that are present in the United States, *see* 28 U.S.C. §§ 1609–11, and courts of the foreign sovereign are often legally prohibited from enforcing judgments against the state or insufficiently independent from the political branches to do so. *See* George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 Ariz. J. Int'l & Comp. L. 665, 666 (2008). Further, other countries may not respect U.S. judgments and may therefore decline to attach assets located within its borders. *See id.* at 666–67.

Re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 128.

First, state sponsors of terrorism are less likely than other sovereigns to have attachable assets in the United States. Federal law broadly prohibits business dealings with state sponsors of terrorism. *See* 31 C.F.R. §§ 538.203–538.205 (prohibiting business dealings involving Sudan); *id.* § 542.201 (blocking assets related to the Syrian government); *id.* § 515.201 (prohibiting transactions with Cuban government); *id.* §§ 560.201, 560.204 (prohibiting exportation and importation of goods and services to or from the Government of Iran). It also permits the federal government to freeze these states' assets located in the United States. *Id.* § 560.211. In light of these sanctions laws, state sponsors of terrorism typically keep their assets out of the reach of the U.S. government. The flow of attachable assets from these states into the United States is therefore virtually nonexistent.

Second, in an attempt to circumvent international sanctions regimes and to fund terrorist activity surreptitiously, state sponsors of terrorism often use secret and labyrinthine financial structures to hide their assets. An example is the Execution of Imam Khomeini's Order (EIKO), a massive network of front companies that manages finances for the Iranian government. The U.S. Treasury Department, which exposed this network in June 2013, indicates that EIKO operates "37 ostensibly private businesses," the purposes of which are "to generate and control massive, off-the-books investments [for the Iranian Government], shielded from the view of

the Iranian people and international regulators." *See* Press Release, U.S. Dep't of Treasury, *Treasury Targets Assets of Iranian Leadership*, Jun. 4, 2013. Similarly, to undermine sanctions on its oil industry, Iran employed front companies to disguise the fact that oil tankers were being purchased on behalf of the National Iranian Tanker Company and used to transport Iranian oil. *See* Press Release, U.S. Dep't of Treasury, *United States Exposes Iranian Shipping Scheme*, Mar. 14, 2013. Because the existence and location of secret finances are (by definition) unavailable to terrorism victims and their families, these assets are nearly impossible to attach.

Third, terrorist states in nearly all circumstances reject the authority of U.S. courts and decline to appear to defend against claims, resulting in default judgments. *See* Congressional Research Service, *Suits Against Terrorist States By Victims Of Terrorism* 7, (Aug. 8, 2008).[7] Because terrorist states are often not present to respond to post-judgment discovery orders, and they stand beyond the reach of contempt measures that a court could otherwise use

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[7] *See, e.g.*, *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000) ($24.7 million in compensatory damages and $300 million in punitive damages); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) ($41.2 million in compensatory damages and $300 million in punitive damages); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) ($65 million awarded in compensatory damages); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) ($27 million in compensatory damages and $225 million in punitive damages); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) ($50 million in compensatory damages and $137.7 million in punitive damages).

to obtain compliance with the post-judgment discovery process.

2. Congress Has Amended The FSIA To Facilitate The Collection Of Judgments Against State Sponsors Of Terrorism.

Congress first addressed the issue of recovering on terrorism judgments in AEDPA. In addition to creating a new exception to jurisdictional immunity under the FSIA, AEDPA also allowed terrorism-judgment holders to attach the commercial property of terrorist states within the United States regardless of whether there is a connection between the property and the claim. *See* 28 U.S.C. § 1610(b)(2).

Given the difficulties in locating attachable assets of state sponsors of terrorism, *see supra* Part I.B.1, many of the first plaintiffs to obtain judgments sought to attach assets frozen by the U.S. government. *See, e.g., Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). These attempts failed because the U.S. government successfully intervened in these cases and quashed the writs of attachment. *See generally* Sean D. Murphy, *State Jurisdiction and Jurisdictional Immunities: Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 Am. J. Int'l L. 117 (2000).

In response to these rulings, Congress amended the FSIA to allow attachment of diplomatic property and frozen assets, while permitting the President to waive attachment under this provision if he deemed waiver necessary for national security

reasons. *See* Pub. L. No. 105-277, Div. A, Title I, § 117, 112 Stat. 2681-491 (Oct. 21, 1998) (codified at 28 U.S.C. § 1610(f)(1)(A)). Congress also took the extraordinary step of instructing senior executive officials to help terrorism victims locate assets to satisfy their judgments:

> At the request of any party in whose favor a judgment has been issued with respect to a claim [under the state-sponsor-of-terrorism provisions], the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

28 U.S.C. § 1610(f)(2)(A).

Despite offering the prospect of Executive Branch assistance, this amendment provided little relief to terrorism victims. Upon signing the bill into law, the President immediately exercised his waiver authority to prevent attachment of foreign sovereign assets in terrorism cases. *See* Presidential Determination 99-1 (Oct. 21, 1998), *reprinted in* 34 WEEKLY COMP. PRES. DOC. 2088 (Oct. 26, 1998). The President exercised his waiver authority because, in his view, "the struggle to defeat terrorism would be weakened, not strengthened, by" allowing the attachment of frozen assets. *See* White House, Statement by the Press Secretary (Oct. 21, 1998).

Congress's efforts to allow judgment holders to attach frozen assets were thus frustrated as soon as the law took effect.

Congress responded to the President's waiver by enacting a new provision that required the liquidation of a portion of Cuba's frozen assets to pay certain judgments. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (Oct. 28, 2000). This bill also provided limited relief to certain plaintiffs with judgments against Iran by earmarking federal funds to offer an alternative to pursuing their claims against Iran in court. *Id.*

In 2002, Congress reaffirmed its intent to make blocked assets available for attachment by terrorism victims. *See* Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002) (codified at 28 U.S.C. § 1610 Note). The TRIA clarified Congress's intent to permit a presidential waiver only in limited circumstances. Under the TRIA, the President can no longer broadly waive the provision allowing attachment of terrorist states' property, but instead can waive attachment only for "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations." 28 U.S.C. § 1610 Note.

In 2008, Congress again amended the FSIA to assist terrorism victims in collecting judgments from foreign sovereigns. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No.110-181, § 1083(a)(1), 122 Stat. 3 (Jan. 28, 2008) (codified at 28 U.S.C. § 1605A(g)(1)). This amendment permit-

ted, for the first time, *prejudgment* attachment of a foreign state's assets, by authorizing the filing of a notice of a "lien of *lis pendens* upon any real property or tangible personal property" of the terrorist state. *Id.* The amendment also permitted terrorism victims to attach property in which a terrorist state, or an agency or instrumentality of state, holds an interest either "directly or indirectly." *Id.* at § 1083(b)(3)(D) (codified at 28 U.S.C. § 1610(g)(1)). This measure was intended to allow attachment of any property in which the terrorist state has an economic interest. *See Conference* Report to Accompany H.R. 1585, National Defense Authorization Act for Fiscal Year 2008, H. R. Rep. No. 110-477, at 1001 (2007).

3. Congress Did Not Limit Terrorism Victims' Recovery To Blocked Assets.

Congress's repeated efforts to assist victims of state-sponsored terrorism have resulted in payment of some judgments against state sponsors of terrorism. For example, hundreds of millions of dollars in blocked assets have been paid to terrorism victims and their families. *See* Congressional Research Service, *supra*, at 18. But Congress's efforts are far from a complete solution. As one court explained, "the simple fact remains that very few blocked assets exist," and those that do are "a mere drop in the bucket . . . compared to the staggering [amount] in outstanding judgments" in terrorism cases. *In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 58.

According to the latest statistics, the U.S. is blocking $2.29 billion in assets related to the four states currently designated as sponsors of terrorism

(Cuba, Iran, Sudan, and Syria). *See* Office of Foreign Assets Control, U.S. Dep't of Treasury, *Terrorist Assets Report*, tbl. 1 (2012). These blocked assets are thus a small fraction of the total amount of terrorism-related judgments, which was estimated at $19 billion in 2008 and is considerably greater today. *See* Congressional Research Service, *supra*, at 68. This discrepancy has created a situation where "a few dozen plaintiffs in the earliest cases managed to obtain compensation for their losses, but hundreds of other equally deserving victims of terrorism . . . have gotten nothing." *In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 124.

Congress undoubtedly is well aware that blocked assets are insufficient to provide recovery for all of the losses victims of state-sponsored terrorism have sustained. In repeatedly amending the FSIA to assist these victims, Congress has never suggested that the victims could not invoke ordinary post-judgment discovery procedures to locate assets they could pursue worldwide in an effort to enforce the judgments they have won in U.S. courts. As explained in the following section, it is plain that such discovery is in fact available.

II. An Immunity From Post-Judgment Discovery Would Be Contrary To The Text And Structure Of The FSIA And Would Frustrate Congress's Efforts To Assist Victims Of State-Sponsored Terrorism.

Argentina argues for an immunity from post-judgment discovery based on the absence of a provision in the FSIA that expressly provides for such dis-

covery. That same logic would dictate that terrorist states also have immunity from post-judgment discovery because, despite the many amendments discussed above, Congress has never expressly stated that terrorism victims may conduct post-judgment discovery under the Federal Rules of Civil Procedure. The Court should reject this argument as contrary to the text and structure of the FSIA.

The Court should also reject the argument because it would frustrate Congress's objective of holding state sponsors of terrorism accountable for their conduct. To achieve this objective, the FSIA must be interpreted to provide FSIA judgment holders with the same rights as other parties seeking to enforce judgments in U.S. courts, including the ability to conduct discovery pursuant to the Federal Rules of Civil Procedure. Given Congress's concerted efforts to assist terrorism victims in collecting judgments, Congress surely would have acted explicitly to deprive terrorist states of immunity from post-judgment discovery if it thought that such an immunity existed, or at least would have explained why it was not doing so. Congress's silence on the issue of post-judgment discovery is strong evidence that it expected this discovery to be available for terrorism victims just as it is available to plaintiffs in ordinary civil cases.

A. The Federal Rules Of Civil Procedure Govern Post-Judgment Discovery Because The FSIA Imposes No Limitations On This Discovery.

Federal Rule of Civil Procedure 69 generally governs post-judgment discovery in civil proceedings. This rule must also govern post-judgment discovery in FSIA proceedings unless the FSIA contains a "plain statement of a pre-emptive intent." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987). In enacting and repeatedly amending the FSIA, Congress has paid special attention to the consequences of authorizing proceedings against foreign sovereigns under the Federal Rules of Civil Procedure. In some circumstances, Congress has determined that the federal rules are inadequate and has drafted special rules to apply in FSIA proceedings. In other circumstances, Congress has chosen not to depart from the traditional federal rules. Because Congress has not expressed any intent to displace the traditional rules governing post-judgment discovery, those rules must apply here.

The FSIA has always included a number of provisions that specifically depart from the Federal Rules of Civil Procedure. For example, it displaces Rule 4 by providing different rules for service in FSIA proceedings. 28 U.S.C. § 1608(a). It displaces Rule 12 by providing 60 days for the foreign sovereign to serve its answer to a complaint. *Id.* § 1608 (d). And it displaces Rule 55 by requiring a plaintiff to present evidence establishing its right to relief before a default judgment is entered. *Id.* § 1608(e).

As originally enacted, the FSIA was silent on procedures governing discovery. That silence was not an oversight. To the contrary, the legislative history makes clear that Congress considered the issue of discovery and concluded that the Federal Rules of Civil Procedure should govern FSIA proceedings. *See* H.R. Rep. No. 94-1487, at 23 (1976), 1976 U.S.C.C.A.N. 6604, 6621 ("The [FSIA] does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. . . . [If] a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply."). As the D.C. Circuit has explained, "Congress kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011).

In amending the FSIA, Congress has continued to consider the extent to which special rules are needed to govern FSIA proceedings. It has provided a special rule for discovery in just one instance. When Congress created an exception to jurisdictional immunity for state sponsors of terrorism, it expressly imposed a limitation on orders for discovery from the United States. That exception allows a court to stay the discovery if the Attorney General certifies that it "would significantly interfere with a criminal investigation or prosecution, or national security operation, related to the incident that gave rise to the cause of action." 28 U.S.C. § 1605(g)(1). Notably, this provision demonstrates Congress's concern with only a narrow set of discovery orders: those addressed to the U.S. government that would interfere

with prosecutorial or national security interests. There is no mention of discovery sought from foreign sovereign defendants, either in this provision or elsewhere in the statute, leaving such discovery to be governed by the Federal Rules of Civil Procedure.

Rather than cutting back on discovery against foreign states, Congress acted to help plaintiffs such as *amici* obtain more information about the assets of those states. When it amended the FSIA to allow terrorism victims to attach the blocked assets of the foreign state, Congress instructed the Secretary of State and Secretary of the Treasury to assist them in locating and identifying assets to satisfy their judgment. 28 U.S.C. § 1610(f)(2). In taking the remarkable step of authorizing private plaintiffs to enlist the help of senior executive officials in their search for assets, Congress never suggested that those same plaintiffs were barred from pursuing those same assets using traditional discovery under the federal rules. Reading such a bar into the FSIA, with no basis in the text of the statute, would be at odds with Congress's effort to make it easier for the victims of state-sponsored terrorism to obtain information on foreign state assets.

Indeed, the fact that Congress *did not* include in the FSIA a provision explicitly providing victims of terrorism with a right to post-judgment discovery strongly suggests that Congress did not believe that the FSIA generally limits such discovery. If Congress had understood the FSIA to restrict victims' access to information about terrorist states' assets that ordinarily would be available under the Federal Rules of Civil Procedure, it surely would have pro-

vided expressly for a right to such discovery for victims in addition to enlisting the investigative resources of the Executive Branch.

B. An Immunity From Post-Judgment Discovery Would Frustrate Congress's Efforts To Assist Victims Of State-Sponsored Terrorism.

Applying the Federal Rules of Civil Procedure to post-judgment discovery in FSIA cases is not only supported by the statutory text, it also furthers Congressional intent. Congress has repeatedly acted to assist victims of terrorism in the recovery of damages in order to lessen the difficulty of enforcing judgments against terrorist states. *See supra* Part I.B. These efforts would be frustrated if foreign sovereigns were immune from post-judgment discovery in aid of execution. Such an immunity would make it all but impossible for victims to attach a terrorist state's foreign assets.

In light of the particular difficulties victims face in identifying and attaching assets of state sponsors of terrorism, post-judgment discovery is especially important in terrorism cases. Terrorism victims need access to the ordinary scope of post-judgment discovery to obtain information from third parties and identify assets abroad that may be attachable by a foreign court. While the prospects of successfully executing on such attachments are generally not good, foreign courts remain a legally viable method to pursue satisfaction of judgments. *See In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 123 n.48 ("This Court is not overlooking

the possibility of execution of judgments through enforcement proceedings in foreign jurisdictions, at least one scholar has recently suggested as a still-viable means of recovery in these actions.") (citing Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 Duke J. Comp. & Int'l L. 307 (2009)).

If the Court adopts Argentina's broad view of sovereign immunity and significantly restricts the scope of post-judgment discovery, even this narrow avenue of enforcement will be closed to terrorism victims. Plaintiffs in terrorism cases cannot be expected to identify and locate attachable assets of state sponsors of terrorism *before* obtaining discovery designed to shed light on those very assets. It is highly unlikely, given the secrecy and intransigence of terrorist states, that terrorism victims will successfully locate attachable assets without the aid of discovery. The consequences of such an immunity will be the denial of damage awards to terrorism victims and greater impunity for terrorist states.

In passing AEDPA to amend the FSIA, "Congress manifested its intent that U.S. nationals who are 'victims of terrorist states be given a judicial forum in which to seek redress.'" *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 106 (D.D.C. 2000) (quoting *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 50–51 (D.D.C. 2000)). Congress was motivated by the principle that "[t]hose nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit, that is within the prerogative of

Congress to grant or withhold." *Daliberti*, 97 F. Supp. 2d at 52. By exposing terrorist states to liability and enforcement of judgments, Congress sought to "deter terrorism [and] provide justice for victims." Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) In short, Congress wanted "rogue governments who sponsor international terrorism [to] pay *literally*." 148 Cong. Rec. S11524, S11526 (Nov. 19, 2002) (statement of Sen. Harkin) (emphasis added).

In light of this clear congressional intent, the FSIA cannot be interpreted to provide an atextual immunity that would prevent terrorism victims from attempting to discover where terrorist states hide their assets. Congress has required the Executive Branch to assist victims in the search for assets to attach, exposed terrorist states to punitive damages, authorized attachment of blocked assets, and allowed for pre-judgment liens on foreign sovereign property within the judicial district. *See supra* Part I. It is inconceivable that Congress would enact such extraordinary measures but fail to afford victims the standard tools of post-judgment discovery generally available to plaintiffs in civil cases. The common sense explanation for why Congress has not expressly provided for post-judgment discovery in terrorism cases is that this discovery is already available under the FSIA, and that nothing in the statute renders foreign sovereigns immune from it.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE HISPANIC AMERICAN CENTER FOR ECOMONIC RESEARCH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Hispanic American Center for Economic Research (HACER) is a 501(c)(3) organization that promotes the values of personal and economic liberty, limited government under the rule of law, and individual responsibility. Lacking traditions that consistently uphold the rule of law, the free society remains a work-in-progress throughout the Spanish-speaking countries of the Western hemisphere.

Given the importance of the Supreme Court case of *Argentina vs. NML Capital* not only for Argentina, but also for the countries in the region which have higher respect for contracts, HACER would like to focus this Court's attention on the importance to other countries of a proper interpretation of the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

The text of the Foreign Sovereign Immunities Act (FSIA) presumes the availability of post-judgment discovery of Argentina's assets, directed at least to third parties. The text of the FSIA is not as opaque as some believe. Employing a series of traditional, but often ignored, canons of construction demonstrates that the correct interpretation of the FSIA permits the post-judgment discovery order in this case. Traditional statutory interpretation, as applied to the

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Respondent has filed a blanket consent letter with the Clerk's Office. Petitioner's consent letter is being filed with this brief.

Louisiana State University Law Center is not a signatory to this brief and the views expressed here are those of counsel.

FSIA, involves comparing various sections of the Act and viewing their relationships through the lens of several canons.

Argentina's claim that the FSIA does not authorize U.S. courts to order discovery from third parties requests this Court to create common law, rather than to engage in statutory interpretation. Argentina's arguments claiming third-party immunity from discovery as to Argentina's property rest on fallacies that contradict the text. The consequences of Argentina's position would be to cloak private parties with sovereign immunity from responding to legitimate post-judgment discovery requests. Argentina, moreover, signed an explicit waiver of its immunity from post-judgment attachment and execution, another text it wishes to avoid.

ARGUMENT

The text of the Foreign Sovereign Immunities Act (FSIA) presumes the availability of post-judgment discovery of Argentina's assets, directed at least to third parties. Even apart from its explicit waiver, Argentina's claim that the FSIA does not authorize U.S. Courts to order discovery from third parties concerning immune property rests on fallacies that contradict the text. Argentina, however, cannot possibly make any arguments to contradict the text of its explicit waiver of immunity. So Argentina simply refuses to acknowledge the waiver that it cannot dispute.

In pertinent part, the waiver explicitly provides that

> from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction

> there shall be attributed such an immunity, the *Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted* by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment), (emphasis added).

J.A. at 106.

Apart from the waiver, the issue of post-judgment discovery should be resolved by interpreting the FSIA according to traditional canons of interpretation. The United States Departments of State and Justice, in an *amicus curiae* brief, have expressed concern about the impact of this Court's decision on other countries and their reciprocal relations with this country. Their brief, however, makes no mention of the fact that most other countries, including Latin American countries, base their laws primarily on statutes. Their judges and lawyers are accustomed to the rules of statutory interpretation, but not to the vagaries of judge-made, common law. Concern, therefore, about the impact of this case abroad should consider the need for an interpretation based on traditional rules of statutory construction.

The failure of judges to apply traditional rules of interpretation to the FSIA has created considerable confusion. This confusion affects important interests in the non-common-law world. In 2010, the General Counsel for the New York Federal Reserve Bank said the following in a lecture to members of the Central Reserve Bank of Peru.

> Making one's way through the FSIA's provisions can be daunting. Judges in the United States have called the FSIA "remarkably obtuse," a "statutory labyrinth," with a "bizarre structure," and "deliberately vague provisions."[2]

We believe that actually the FSIA is a fairly intelligible statute. Applying traditional canons of textual interpretation is what clarifies the statute's meaning. Doing so leaves no room for Petitioner's attempt to create third-party immunity to prevent post-judgment discovery of Argentina's property.

I. The District Court's Discovery Order is Perfectly Consistent with the FSIA.

The words of the FSIA "are of paramount concern and what they convey, in their context, is what the text means." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012, Thompson/West; St. Paul, Mn,) (Hereinafter "*Reading Law*") at 56. The FSIA makes only one reference to discovery (section 1605(g)) and it concerns pre-trial discovery. The words of the FSIA, "in their context," including its lone reference to discovery, however, leave no doubt that the FSIA permits the post-judgment discovery ordered by the district court.

In explicating the text of the FSIA, we begin with the whole-text canon. *See Reading Law* at 167. While the Second Circuit opinion below, *EM Ltd. v. Republic*

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[2] Thomas C. Baxter Jr., General Counsel and Executive Vice President, Federal Reserve Bank of New York, "Recent Developments in Key Legal Issues of International Reserves Investments", www.newyorkfed.org › ... › Speeches (last visited March 31, 2014).

of Argentina, 695 F. 3d. 201 (2d Cir. 2012), is correct in noting that nothing in the text bars post-judgment discovery of the kind ordered by the district court, *see id.* at 210, reading the text of the FSIA as a whole also provides positive support for that conclusion.

A. The Text of Sections 1610 (Exceptions) and 1603 (Definitions) Presume and Often Necessitate Broad Post-Judgment Discovery.

While "[n]o canon of interpretation is absolute," *Reading Law* at 59, several canons support the conclusion that the FSIA not only presumes, but may require such discovery. The most obviously applicable one is the predicate-act cannon: "Authorization of an act also authorizes a necessary predicate act," *Id.* at 192.

> In the context of legislation, it has long been held that "whenever a power is given by a statute, everything necessary to making it effectual or requisite to attaining the end is implied."
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> *Id.*at 192-93., quoting James Kent, *Commentaries on American Law* *464 (Charles M. Barnes ed., 13th ed. 1884).

Post-judgment discovery, pursuant to Fed. R. Civ. P. 69(a), is "necessary to making [the FSIA] effectual or requisite to attaining the end [and therefore] is implied."

Although the Second Circuit's opinion in this case did not mention the predicate-act canon, it actually did apply it.

> The district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in

> question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments. [*First City, Texas-Houston, N.A. v.*] *Rafidain* [*Bank*] II, 281 F. 3d at 53-54; *cf. Riggs v. Johnson Cnty.*, 73 U.S. 166, 187, 6 Wall. 166, 18 L.Ed. 768 (1867) ("*Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.*")

695 F.3d at 208 (emphasis added).

Section 1610 empowers Respondent NML to attach or execute on assets which fall within its list of exceptions to foreign-state immunity. As previously pointed out, the first of these exceptions covers waivers. Even in the absence of waiver, however, a judgment-creditor would often—if not almost always—need to resort to discovery in order to distinguish assets 1) that do from those that do not fall within the exceptions of 1610 and 2) that fall within subsection (b) from those in subsection (a).

The exceptions listed in (a) of 1610 authorize the judgment-creditor to attach or execute on property only if that property (1) belongs to "a foreign state as defined by section 1603(a);" (2) is "used for a commercial activity in the United States;" and 3) is located "in the United States." The quoted terms of (1) and (2) are defined in section 1603. It is apparent that parts of those definitions will require discovery in certain situations. In particular, the coverage of the term "a foreign state as defined by section 1603(a)" extends beyond what in ordinary usage might be

considered a foreign state. Consequentially, the ordinary-meaning canon does not apply to the term "foreign state." *See Reading Law* at 69. Rather, the interpretive-direction canon applies. *Id.* at 225. That means that "Definition sections and interpretation clauses are to be carefully followed." *Id.*

Carefully following the definition in Section 1603(a) of "foreign state" means focusing on two categories within the definition that are treated differently in the exceptions listed in Section 1610. Section 1603(a) provides that "A 'foreign state'... includes a *political subdivision* of a foreign state or *an agency or instrumentality* of a foreign state as defined in subsection (b), (emphasis added). The words "Agency or instrumentality," but not "political subdivision," are then defined in Subsection (b) of 1603. Subsection (b)(2) also recognizes that a political subdivision of a foreign state may own or control an agency and instrumentality.

In order to avoid confusion, we will refer to the foreign state itself as the sovereign. A sovereign like Argentina and its political subdivisions enjoy greater protection under Section 1610 than do their agencies and instrumentalities. Subsection (a) provides exceptions which apply to the sovereign, its political subdivisions, and their agencies and instrumentalities because all fall within the definition of "foreign state." Subsection (b) of 1610, however, provides additional exceptions applicable only to agencies and instrumentalities. Distinctions between the sovereign or its political subdivisions and their agencies and instrumentalities can be critical to success or not with respect to post-judgment attachment. See, for example, *NML Capital Ltd.. V. Banco Central De La Republica Argentina*, 652 F.3d 172, 180-81 (2d. Cir.

2011) (suggesting that NML missed the opportunity to attach certain of assets by, *inter alia*, failing to argue a principal-agency relationship between the sovereign and the bank.)

Establishing a principal-agency relationship will often require discovery. Without post-judgment discovery, the judgment-creditor may be unable to establish whether property is that of 1) the sovereign or a political subdivision; 2) a corporation that is an agency or instrumentality of the sovereign or a political subdivision; or 3) a corporation that is not an agency or instrumentality of the sovereign. A foreign sovereign, such as Argentina, attempting to hide assets may well use corporations as agents or instrumentalities to move assets around the world. A corporation that arguably acts as an agency or instrumentality of a foreign state will be more vulnerable to having its property seized if it can be proved that it "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." Sec. 1603(b)(2).

A judgment-creditor must be able to direct discovery at least towards those corporations in order to probe the possible existence of a principal-agency relationship. For Argentina, it becomes imperative to frustrate discovery that might clarify the critical statutory distinctions: not only whether property is located "in the United States" and "used for commercial activity in the United States," but also whether certain corporations are agencies or instrumentalities of the sovereign or its subdivisions.

In *De Letelier v. Chile*, 748 F.2d 790, *cert. denied*, 471 U.S. 1125 (1985), the Second Circuit prevented the judgment creditor from executing on property of LAN

Chile Airlines due, *inter alia*, to LAN's separate juridical status from the Republic of Chile. *De Letelier* distinguished this Court's decision in *First National City Bank v Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), which had disregarded separate corporation identities based on "international equitable principles." Nevertheless, *De Letelier* read *Bancec* to say:

> The broader message is that foreign states cannot avoid their obligations by engaging in abuses of corporate form. The *Bancec* Court held that a foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.

748 F. 2d at 794

B. The FSIA's 1996 Amendment Creating Its Lone Limitation to Discovery, Section 1605(g), Implies the Absence of other Limitations on Discovery.

Section 1605(g) suggests the relevance of several canons. The lone limitation on discovery in section 1605(g) permits the US Attorney General to request a stay of pre-trial discovery directed at the U.S. Government when he "certifies [it] would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action." The subsection continues by providing a limitation on the length and a possible renewal of the stay. Although the last part of the subsection preserves "privileges ordinarily available to the United States," the FSIA nowhere

allows the United States as broad a limitation on *pre-trial* discovery as Argentina is asserting for *post-judgment discovery*.

Although the negative-implication canon "must be applied with great caution, since its application depends so much on context," *Reading Law* at 107, it seems to apply here. One part of the statute only contains a limitation on discovery. That limitation, subsection (g) of 1605, lies within that part of the statute dealing with jurisdiction. Elsewhere, the FSIA sections on jurisdiction and those on attachment and execution have parallel provisions. Compare 1) sections 1604 and 1609, both using mostly identical language on the principles of immunity; and 2) sections 1605(a)(1)-(3) and 1610(a)(1)-(3) which have similar, but not identical, language on the general exceptions to immunity. No such parallelism exists between the jurisdiction and attachment/execution with regard to discovery.

Also, the related-statutes canon, *see Reading Law* at 252, supports reading these different sections of FSIA "in *pari materia*." The same canon also suggests that the FSIA should not be read to clash with the Federal Rules of Civil Procedure on discovery ("laws dealing with the same subject—being in *pari materia*—(translated as "in a like matter) should if possible be interpreted harmoniously." *Id.*)

Consider also that Section 1605(g) represents an amendment to the FSIA. According to the reenactment canon, "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning." *Reading Law*, at 256. No one can doubt that the addition of subsection (g) of 1605 is a significant change. In

context, the amendment adding subsection (g) reflects a concern that without adding this limitation the US Government would be subject to pre-trial discovery under the circumstances listed therein. That implies that the FSIA, prior to the amendment, contained no limitations on even on pre-trial discovery.

II. Argentina's Attempt to Narrow the FSIA Rests on Fallacies that Contradict the Text.

Argentina contends that reading the FSIA as narrowly limiting post-judgment discovery conforms to "established principles of statutory construction." Pet. Br. at 26. In particular, it mentions a canon "that statutes are presumed not to abolish common law principles," *id.* at 33, especially when sovereign immunity is involved. *Id.* at 34. Of course, sovereign immunity has eroded over time. In 1952, the State Department adopted the "restrictive" theory of sovereign immunity. In 1976, with the FSIA, Congress basically codified the "restrictive" theory. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Still, Congress further restricted the immunity. "Even after 1952, however, the 'property of foreign states' continued to be 'absolutely immune from execution to satisfy a judgment.'" Br. U.S. at 2-3. Then the FSIA removed the immunity for certain, foreign-state property, as discussed above. Moreover, the FSIA displaced the common law on sovereign immunity, providing in Section 1602 that "[c]laims for foreign states to immunity should henceforth be decided ... in conformity with the principles set forth in this chapter." Like many advocates, however, Argentina's brief urges this Court to engage in common-law judging to limit the text of the FSIA in an attempt to avoid the statute's "fair meaning." *See*

Reading Law at 3 ("In an age when democratically prescribed texts (such as statutes, ordinance, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning.")

Argentina also attempts to limit the effect of the text in Section 1606 on "Extent of Liability" ("the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"), saying it refers only to a finding of liability and not to execution on the judgment. As noted above, during the period 1952 to 1976 sovereign property was still absolutely immune despite adoption of the restrictive theory. Whether or not Section 1606 applies to attachment, it certainly does nothing to limit attachment or execution. The immunity and exceptions applicable to attachment and execution on a judgment are stated later, in Sections 1609, 1610, and 1611. In those sections, nothing in the text supports Argentina's claim to blanket immunity from discovery that might involve immune assets, which immunity claims not only for itself, but for third parties.

These and other dimensions of Argentina's misinterpretation of the FSIA rest on two main two points: 1) that the FSIA carves out only a narrow exception as to property that is subject to attachment and execution ("Congress authorized enforcement proceedings only to the extent they directed to that narrow category of sovereign property." Pet. Br. at 22); and 2) that post-judgment discovery is basically limited to that narrow category of property (the discovery order covers "property that falls far outside the narrow exception to immunity." *Id.*). Argentina posits, therefrom, "assets that are *indisputably immune*" (emphasis added) not only from attachment

and execution, but from post judgment discovery. *Id.* at 25.

A. If there is a category of "sovereign assets that are indisputably immune" from post-judgment discovery it is not property outside the United States, but Diplomatic Property Inside the United States.

1. Argentina introduces into the heading, ARGUMENT, a novel category of assets that it labels "indisputably immune" from court-ordered, post-judgment discovery. ("The FSIA does not permit ... discovery concerning sovereign assets that are *indisputably immune...*" Pet. Br. at 25 (emphasis added).). Creation of the term "indisputably immune" imposes on the text a concept not grounded therein. As discussed below, the FSIA's recognition of immunity from attachment and execution assets is properly divided between "presumptive" and "absolute" immunity. Even absolutely immune property is not absolutely immune or "indisputably immune" from discovery. Argentina, however, attempts to extend the immunity of the assets from attachment and execution to immunity from discovery.

The only category of property that could be labelled "indisputably immune" is diplomatic property. Diplomatic property consists of the buildings and properties of Argentina's missions in other countries, i.e., embassies and consulates. Although such properties are not foreign sovereign territory, embassies and consulates nevertheless represent the functional and symbolic core of a foreign country's sovereign mission to the United States. As a matter of age-old custom

and modern treaty, based on the principle of reciprocity, foreign-mission property enjoys not only immunity from attachment or execution, but complete "inviolability."

The FSIA incorporates and respects these principles of diplomatic law. In particular, the FSIA is perfectly consistent with Article 22 of the Vienna Convention on Diplomatic Relations.[3] That is to say, Article 22 confirms that foreign mission property is "inviolable." Moreover, Article 22 also explicitly preserves the immunity of foreign-mission property from attachment or execution.

Diplomatic property would appear to be the only category of assets that could properly be called "indisputably immune." As discussed in the next two parts, non-diplomatic property may be absolutely immune under Section 1611 or presumptively immune under Section 1610, but not "indisputably immune from discovery," which will often be required to determine whether the property is in fact immune. Such property, which ultimately may be shown to be

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[3] Article 22, The Vienna Convention on Diplomatic Relations.

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

immune, cannot be considered—certainly prior to discovery—"indisputably immune."

B. Property Outside the United States is not "indisputably Immune" from Post-Judgment Discovery.

Argentina's primary aim is to prevent discovery of assets held outside the United States. Argentina argues that because such assets are immune from attachment, they must also be immune from discovery. This derivative immunity has no basis in the text. In the exceptions in Section 1610(a) and (b), the property to be attached or executed upon must be "in the United States." Of course, as the Second Circuit opinion in this case recognized, a district court simply has neither the jurisdiction to issue an attachment order, nor the power to enforce one outside the United States. See 695 F.3d at 208 ("a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries."). The district court, however, does have the "power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." *Id.* Thus, the Extraterritorial canon, see *Reading Law* at 268, which Argentina invokes, Pet. Br. at 37, simply does not apply.

Property outside the United States may be immune only due to its location at the moment. Once inside the United States, the same property would be subject to attachment and execution if "the property is or was used for the commercial activity upon which the claim is based." Section 1610(a)(2). Argentina proposes a reading of the FSIA which would allow it to conceal any assets that are easily moveable in and out of the United States.

1. Property listed in Section 1611, although absolutely immune from attachment, is not absolutely immune from discovery, at least through third parties.

a. Military Property. The first and third subsections of 1611 apparently do not apply.[4] Argentina, however, contends at several points that discovery about military property is barred because 1611(b) provides for its absolute immunity, Pet. Br, at 25, 28, 40, and 50. 1611(b)(2) does recognize immunity for property which "is, or is intended to be, used in connection with a military activity and (A) is of a military character, or (B) is under the control of a military authority or defense agency military equipment and that immunity is not subject to any exceptions.

The military equipment broadly defined in 1611(b)(2) is comparable to the diplomatic immunity described above. Like diplomatic property, military property represents the core of a foreign state's sovereignty. Nevertheless, that immunity 1) does not resolve factual matters as to when particular property actually becomes the military property protected by 1611(b)(2) and 2) does not mean that discovery cannot be addressed to third parties.

This Court's unanimous opinion in *Argentina v. Weltover*, 504 U.S. 607 (1992), which distinguishes between sovereign and commercial activity, notes that "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts." *Id.* at 614-15. In

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[4] Organizations covered by the International Organizations Immunities enjoy absolute immunity. Section 1611(a). Absolute immunity under subsection (c), an action under one particular statute, is also inapplicable.

practice, distinguishing the point when contracted-for army boots or bullets become property of a foreign state for purposes of 1611(b)(2) will require discovery at least from one or more third parties.

Suppose a foreign state contracts to purchase army boots and bullets from a supplier in the United States. Further suppose that the contract requires a down payment. It is unlikely that, under the contract, ownership of the property will transfer to the foreign state until full payment for, or delivery of, the property is made. If the supplier still owns the property, the judgment-creditor should be able to execute on the down payment. If the foreign state has cleverly provided in the contract that title passes immediately upon the supplier's receipt of the down-payment, then the judgment-creditor cannot execute on this property. A judgment-creditor needs to know whether a down payment has been made and whether a transfer of ownership under the contract has occurred. The judgment-creditor cannot know these things without knowing what the contract provides and what payments have been made. Such knowledge is virtually unattainable without discovery, at least from third parties.

Argentina treats discovery directed at third parties as indistinguishable from discovery from itself. Argentina argues that either is equally insulting to its sovereignty. This Court need not resolve whether it is ever permissible for a judgment-creditor to obtain discovery from the foreign state regarding the status of property ordered for the military, whether merely contracted for, or actually acquired. Discovery from third parties such as suppliers and banks regarding the status of contracted-for military property, however, actually avoids a potential affront to a foreign

state's sovereignty. If federal discovery from third-parties is not available, the judgment-creditor, where allowed by state law, would be well advised simply to execute on the property while in the possession of the supplier. If the property happens to be owned by the foreign state, the foreign state itself will likely have to contest the seizure, just as Argentina is contesting the discovery order below directed at third parties. The sovereign may well have to produce the information demonstrating its ownership that otherwise would have been gained from third-party discovery.

b. Central Bank Funds. Unlike property owned by a foreign state's military, central bank funds are not always immune and, even if immune, may not be immune from discovery directed not only to third parties, but to the bank itself.

Under 1611, central bank funds must be "held for its own account" in order to be absolutely immune. A central bank may well claim that assets are immune, but the matter may be in doubt. The doubt may present legal or factual issues. NML lost in the Second Circuit on two legal issues as to immunity of Argentine reserves held at the New York Federal Reserve bank. *NML Capital Ltd. V. Banco Cent. De la Republica Argentiana*, 652 F.3d 172 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). The Second Circuit held that 1) that immunity under 1611(b)(1) does not require a central bank be independent from the parent state, *id.* at 190 and 2) that funds "held in an account in the name of a central bank. . . are *presumed* to be immune from attachment." *Id.* at 194 (emphasis added.)

The test adopted under the second holding of the case anticipates the necessity, at times, for discovery when a judgment-creditor seeks to overcome the presumption of immunity. After adopting the particular

test in its holding, the court continued: "A plaintiff, however, can rebut that presumption by *demonstrating with specificity* that the funds are not being used for central banking functions as such functions are normally understood, regardless of their 'commercial nature.'" *Id.* (emphasis added; footnote omitted). Such specificity necessarily requires detailed information about how the central bank is using certain funds. That information could only be obtained through discovery, most likely addressed to the central bank itself.

2. If property that is absolutely immune is not "indisputably immune" from discovery, property that has only "presumptive immunity" cannot be "indisputably immune" from discovery. Although the FSIA does not use the term "presumpive immunity," courts have done so. *See e.g.*, *Rubin v. Islamic Rep. of Iran*, 637 F.3d.783, 795 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). The term captures the relationship established between the immunity provisions, 1604 (jurisdiction) and 1609 (attachment and execution of property) and their respective exception sections which follow (1605 and 1610). The immunity of Sections 1604 and 1609 is only presumptive because a creditor may be able to overcome the presumption by establishing its entitlement to one or more of the exceptions provided. It is axiomatic, therefore, that any property that may only be "presumptively immune" cannot possibly be "indisputably immune."

The premise for Argentina's claim against post-judgment discovery directed to third parties is the false notion that presumptive immunity is stronger for attachment or execution of property than for jurisdiction. Argentina relies on *Rubin*, 637 F.3d 783,

which reaffirms Seventh Circuit precedent that "the exceptions to Sec.1609 immunity are drawn more narrowly than the exceptions to Sec. 1604 jurisdictional immunity." 637 F.3d at 797. That statement rests on extended dicta in *Autotech Techs. L.P. v. Integral Research and Dev. Corp.*, 499 F.3d 737 749-51 (7th Cir. 2007), *cert. denied*, 532 U.S. 1231 (2008). ("Although lack of proper notice is enough to dispose of the present appeal, we deem it useful to address Integral's alternative arguments" at 749.) The erroneousness of *Autotech*'s reasoning for narrowing the text is exemplified by the unreality of the following statement characterizing as a "limitation" on attachment and execution the fact that it extends only to property located in the United States.

> The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a *breathtaking* assertion of extraterritorial jurisdiction.
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> 499 F.2d at 750 (emphasis added).

Suppose Congress (without or over a veto from the President) was to exhibit such ignorance that it authorized attachment outside of the United States, just how would that work? This situation would differ from providing mutual recognition of judgments between or among different countries. Any attempt to enforce that kind of extraterritoriality would be more than "breathtaking." It would be impossible—unless the US is prepared to send US Marshalls or the military abroad to enforce an attachment. Thus, the "failure" of Congress to authorize the impossible does

not mean that it has "narrowly" drawn the exceptions to immunity from attachment and execution.

Nevertheless, Argentina's entire argument rests on this erroneous premise, unsupported by the text, that the exemptions from attachment and execution must be viewed more narrowly than the exceptions to jurisdiction. See Pet. Br. at 31 ("The scope of immunity from attachment or execution is drastically narrower than the scope of immunity from suit.") From that premise, Argentina contends that the scope of discovery must be conducted "at least with the same circumspection that applies to the jurisdictional immunity." *Id.* Although *Rubin* supports this argument, *Rubin* recognizes, but dismisses the fact, that it and other cases dealing with post-judgment discovery have taken language from a Fifth Circuit case, *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992), dealing only with jurisdictional discovery. 637 F. 3d at 795.

The Second Circuit opinion, however, agreed with the Seventh and other circuits on jurisdictional discovery, namely that before subject matter jurisdiction has been established discovery must be circumspect because the issue of immunity and discovery are intertwined. ("Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction over the foreign sovereign defendant under the FSIA," citing *First City, Texas-Houston, N.A. v. Rafidian Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998). The Second Circuit opinion in this case, however, then correctly distinguished post-judgment discovery, stating that as to "discovery from a defendant over which the district

court indisputably had jurisdiction, [the same] concerns voiced in *Rafidian I* are not present and our precedents relating to jurisdictional discovery are inapplicable." *Id.*

III. While Positing Derivative Immunity from Post Judgment Discovery for Third Parties, Argentina Ignores its own Broad Waiver of Immunity from Attachment and Execution.

A. Argentina Attempts to Bar Discovery from All Third Parties.

While sovereign immunity has clearly been restricted since 1952, Argentina is attempting to extend sovereign immunity to private parties. First, Argentina's primary authority for its position, the Seventh Circuit opinion in *Rubin*, does not even involve third-party discovery. Argentina, moreover, does not limit its immunity from post-judgment discovery to corporations that are agencies or instrumentalities of Argentina, which at least would correspond to the definition of "a foreign state." The contradiction in Argentina's position as to third parties is that it would extend a sovereign's immunity from post-judgment discovery to entities whose property is immune from attachment precisely because they are not agencies or instrumentalities of the sovereign.

Consider the consequences of Argentina's argument in light of *De Letelier*, discussed above, where the judgment-creditor could not seize the LAN aircraft because the airline corporation was a "separate juridical person." The Seventh Circuit's test in *Rubin* would apparently permit post-judgment discovery directed at other foreign airlines that appear to be "national airlines" in order to determine whether the

airline owning the aircraft is actually operating as a separate juridical person. Under the test in *Rubin*, an aircraft is "specific property that is subject to attachment and [the judgment creditor could] plausibly allege that an exception to Sec. 1609 attachment immunity applies." 637 F.3d at 799. On the other hand, under the *Rubin* test, discovery directed to the airline could not ask about cargo carried in the aircraft unless the judgment-creditor is able to identify specific property that plausibly falls within an exception.

Suppose a an airline that was formerly a "national airline" has been separately incorporated and operated it in such a way that it is not an agency or instrumentality of "a foreign state." Suppose also that the sovereign has a policy of shipping whatever property it sends abroad as cargo only on what formerly was the "national airline." Under the *Rubin* test, even though it is clear that the airline's aircraft regularly carry property of the sovereign, a judgment-creditor cannot ask the airline to identify property owned by the sovereign, its political subdivisions, and its agencies and instrumentalities. If this Court adopts the *Rubin* test, as urged by Argentina, the sovereign would be able both 1) to insulate the aircraft from attachment through separate incorporation for the airline, which is not property of a "foreign state;" and 2) cover the private airline with sovereign immunity from post-judgment discovery.

The absurdity of Argentina's argument should be patent in this aircraft example. Cloaking private commercial aircraft with sovereign immunity from post-judgment discovery would allow the sovereign to fly property of a sovereign-debtor used in commercial activity into the United States with no questions

asked. That amounts to turning a private aircraft into a gigantic "diplomatic pouch."[5]

B. Argentina Ignores Its Explicit Waiver of Immunity from Attachment and Execution.

In order to obtain badly needed financing, Argentina signed a Fiscal Agency Agreement explicitly agreeing to a very broad waiver of its immunity from attachment and execution.

> the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).

J.A. 106-107.

This waiver language in the Fiscal Agency Agreement in this case is the same as that at issue in in *NML Capital Ltd. v. Banco Central De La Republica*

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[5] See the definition and explanation provided on the website of the U.S. State Department. www.state.gov/ofm/.../c37011.htm (quoted in the pertinent part, last consulted March 27, 2014)

Diplomatic Pouch Defined

A diplomatic pouch (or "bag") is any properly identified and sealed package, pouch, envelope, bag, or other container that is used to transport official correspondence, documents, and other articles intended for official use, between:

> Embassies, legations, consular posts, and the foreign office of any government;
>
> . . . .
>
> . . . .

Inviolability of Diplomatic Pouches.

Argentina, 652 F.3d 172 (2d. Cir. 2011), *cert. denied* 133 S. Ct. 23 (2012). Indeed, this waiver language is also the same or similar as in other loan documents. *See id.* at 22. This language, as *Banco Central* states, explicitly waived Argentina's immunity from attachment, although not that of the bank.

> Here, *while the Republic waived immunity under the FSIA for "the Republic or any of its revenues, assets or property,"* the Republic's waiver did not mention the "instrumentalities" of the Republic or BCRA [Banco Central De La Republica Argentina] in particular, much less BCRA's reserves at FRBNY [the Federal Reserve Bank of New York]. As we previously observed, "although the Republic's waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA's immunity from attachment, as it must do in order to be effective." EMI 473 F.3d at 485 n. 22.

652 F.3d at 196. (Emphasis added.)

BCRA escaped attachment because the waiver as to it was not "explicit." Section 1611 provides greater protection to a sovereign debtor's assets than does Section 1610. That is to say, 1611(b)(1) requires that property of a foreign central bank or monetary authority held for its own account is immune unless "explicitly waived." 1611(b)(2) makes no provision for waiver of military property. On the other hand, as to property covered by Section 1610, i.e., "property in the United States of a foreign state" and "used for a commercial activity in the United States," a waiver of immunity from attachment or execution may be accomplished "either explicitly or by implication."

After *Banco Central*, which Argentina won, it cannot possibly deny that it has explicitly waived immunity from attachment and execution on the property covered by the waiver. The appellate opinion below cites and quotes the waiver as to jurisdiction and attachment. 695 F.3d at 203 and note 1. A footnote in Argentina's brief[6] contends that NML has failed to

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[6] Pet. Br. At 19, n.15.

> Although NML never raised the argument in the district court, and therefore forfeited it, NML argued to the Second Circuit that the Republic had purportedly waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit properly did not discuss this point. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks omitted)). In any event, like every other court to consider the issue, the Second Circuit had previously held that even with a waiver of immunity, a court's power is still limited to what the FSIA permits. *EM Ltd. v. Republic of Argentina*, 473 F.3d. 463, 481 n.19 (2d Cir. 2007) (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States . . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria." (internal quotation marks omitted)); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-30 (2d Cir. 2009) (same). This uniform reading is compelled by the plain text of FSIA Section

raise, i.e., has waived, the issue. Other than the footnote, Argentina's brief on the merits completely ignores the issue. After having failed to honor so many of its own very explicit waivers, Argentina may realize that it would be just too unseemly to argue an implied waiver by NML as a way to avoid yet another of its own very explicit waivers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 2, 2014

1610(a), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . *if*—(1) the foreign state has waived its immunity from attachment in aid of execution or from execution." Stat. App. 13a–14a (emphasis added). A waiver of immunity accordingly opens the door to the limited universe of property defined in the preceding text of Section 1610(a); it does not expand that universe.

AMICUS CURIAE BRIEF

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No. 12-842

RECORD AND BRIEFS

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* INDIVIDUAL BONDHOLDER JUDGMENT CREDITORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The law firm of Duane Morris LLP represents various individual plaintiffs ("Individual Bondholder Judgment Creditors") who hold bonds issued by the Republic of Argentina ("Argentina") that are in default and who have been awarded judgments. Although bondholder identity should not change the outcome, Argentina paints the impression that all bondholders who declined to accept Argentina's exchange offers are "vulture funds" looking to exploit defaulted sovereign debt by purchasing bonds on secondary markets at discounted prices and then seeking full value of the debt through litigation. (Argentina's Brief, pp. 10-13). We wish to bring to the Court's attention the Individual Bondholder Judgment Creditors, individuals who purchased the bonds at the time of issue and at par value, hoping to benefit from their investment through interest payments and, upon maturity, full repayment of principal. They did not purchase the bonds as bets or hedges, but as "secure" investments to fund their retirements.

In 2001, Argentina unilaterally repudiated its obligation to pay on the bonds. Since that default, the Individual Bondholder Judgment Creditors have not received any interest payments, and their investments have become illiquid. As was their right to do, the Individual Bondholder Judgment Creditors refused to accept exchange offers in 2005 and 2010, which would

---

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of the brief by these *amici*. A full list of the *amici* are included as an appendix to this Brief.

have yielded only a small percentage of their actual investments. Despite its apparent ability to pay (*see NML Capital, Ltd. v Republic of Argentina*, 699 F.3d 246, 263 (2d Cir. 2012) ("*NML I*")), Argentina has steadfastly refused to make the payments that are due under the defaulted bonds – even to the Individual Bondholder Judgment Creditors who are anything but "vultures" – thereby demonstrating that Argentina's recalcitrance is not predicated upon any principled reason relating to the identity of the bondholders.

This Court's ruling on the Second Circuit's decision will have a dramatic effect on the Creditors' own attempts to collect on the Argentine bonds they purchased at par. Like NML, the Individual Bondholder Judgment Creditors have brought suits against Argentina in the Southern District of New York and obtained judgments.[2] And like NML, the Individual Bondholder Judgment Creditors have subpoenaed the documents of Banco de la Nación Argentina ("BNA") and Bank of America, N.A. ("BOA") in an attempt to determine the location of Argentina's assets and accounts both in the United States and abroad. BNA and BOA have both produced to the Individual Bondholder Judgment Creditors the same documents they produced to NML in response to the subpoenas at issue here.[3]

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2. *See Francheschi, et al. v. Republic of Argentina*, 03-CV-4693, 03-CV-8120, 04-CV-3314, 04-CV-6137, 04-CV-6594, 04-CV-7504, 05-CV-177, 05-CV-2943, 05-CV-3089, 05-CV-4299, 05-CV-4466, 05-CV-6002, 05-CV-6200, 05-CV-6599, 05-CV-8195, 05-CV-8687, 05-CV-10636, 07-CV-0098, 07-CV-5807 (S.D.N.Y.) (Griesa, J.).

3. All that remains is for the district court to approve confidentiality orders designed to allow counsel for the Individual

In its decision, the Second Circuit correctly determined that the post-judgment discovery NML seeks from BNA and BOA, which is the same discovery the Individual Bondholder Judgment Creditors seek, is not barred under the Foreign Sovereign Immunities Act ("FSIA") for two main reasons: (i) the FSIA does not restrict post-judgment discovery; and (ii) the subject banks are not sovereigns. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207-10 (2d Cir. 2012) ("*EM Ltd.*").

Argentina would impose a different regime for post-judgment discovery against a foreign sovereign judgment debtor, transforming a limited immunity from attachment and execution to a near-encompassing immunity from post-judgment discovery. It would paradoxically allow discovery relating to previously *known* assets located in the United States, but deny any discovery relating to Argentina's other assets because such discovery supposedly offends the dignity of recalcitrant sovereign judgment debtors. Thus, the Individual Bondholder Judgment Creditors would be prohibited from using post-judgment discovery to locate assets that might have been filtered into the United States and would be precluded from using the information in support of other possible post-judgment remedies to assist in the collection of judgments. Instead, judgment creditors would be left to pursue admittedly limited discovery in foreign courts in order to locate, and then attempt the seizure of, assets in accordance with the law of the locale.

Bondholder Judgment Creditors to discuss the documents with counsel for other similarly situated bondholders in order to more efficiently and effectively represent their collective interest.

While Argentina's imagined regime would pose burdens on any judgment creditor, the burden is particularly heavy on small individual investors, like the Individual Bondholder Judgment Creditors, who do not have the resources of large-scale investors like the hedge funds. Such individual investors cannot readily hire forensic experts to smoke out the identity and location of assets. Nor can they afford to go on a treasure hunt in multiple foreign forums. Furthermore, the lack of information would make other possible post-judgment remedial proceedings difficult, if not impossible, to bring. In essence, Argentina's regime would leave the Individual Bondholder Judgment Creditors with a right – the default judgment – and no real possibility of a remedy, unless Argentina suddenly decides to reverse the course it has followed for the last decade. How this regime would serve "the interests of justice" and protect the "rights of . . . litigants in United States courts" – the very purposes of the FSIA – is left unexplained.

SUMMARY OF ARGUMENT

The central issue in this appeal is whether a judgment creditor can pursue post-judgment discovery seeking the identification of a sovereign judgment debtor's assets consistent with the FSIA. As an initial point, Argentina has explicitly waived any defenses based on sovereign immunity (including both jurisdictional *and* property immunity) in the bond agreements. As for the statutes implicated in the matter, there is little in the FSIA that pertains to discovery at all and that which exists cannot in any way be construed as a bar to the post-judgment discovery of Argentina's assets. And the legislative history is abundantly clear that the FSIA in itself poses no

limitation on discovery. The inference is unambiguous that discovery, including post-judgment discovery, is governed by Federal Rule of Civil Procedure ("FRCP") 26(b), and, more specifically, FRCP 69(a)(2), which addresses post-judgment discovery directly, various state statutes, including New York's, on post-judgment discovery, and the historical equitable powers of our courts to enforce their own judgments, all of which long pre-date the FSIA.

The Congress that passed the FSIA made very little change in the pre-FSIA post-judgment discovery and remedy structure. The FSIA itself says nothing about post-judgment discovery. Therefore, FRCP 69(a)(2) and the courts' equitable powers are the procedural mechanisms for obtaining such discovery. FRCP 69 permits a judgment creditor to obtain discovery from any person "as provided in [the Federal Rules of Civil Procedure] or by the procedure of the state where the court is located." Further, equity permits courts to make appropriate orders to enforce their judgments.

As for state law, the district court at issue here is located in New York, where the subject banks are also located and where Argentina has specifically agreed to jurisdiction over any controversy regarding the bonds. New York's Civil Practice Law & Rules ("CPLR") § 5223, which governs post-judgment discovery, states that "the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . . ." Further, the courts have an arsenal of statutory and equitable post-judgment procedures available to assure the satisfaction of judgments.

Argentina's paradoxical argument that a judgment creditor should identify an asset before discovery is permitted puts the cart before the horse. There is simply nothing in the FSIA which would remotely suggest that Congress intended such a drastic change in post-judgment discovery when it enacted the FSIA, converting the discovery process into a game of "hide and seek" where all odds favor the recalcitrant judgment debtor.

Argentina also takes the view that its sovereign assets held outside the United States by the two financial institutions cannot be utilized in "the satisfaction of the judgment." But that view is wrong in at least three distinct ways.

First, through a tracing of the flow of funds, the post-judgment evidence produced by the two financial institutions could well lead to evidence that Argentina is secreting commercial assets in the United States. If so, such assets would be subject to execution under the FSIA as § 1610(a) makes clear in light of Argentina's waiver of jurisdictional immunity.

Second, the mere fact that an asset is located outside the United States does not prohibit its attachment or execution. While a United States court could not issue such an order, it is certainly within a judgment creditor's power to ask a foreign court in which the asset is located to seize the asset so that the asset could be used to satisfy a United States judgment. Such requests are commonplace in international jurisprudence and the requested court can be expected to follow its own laws regarding procedure and immunity, taking into account whatever arguments Argentina wishes to advance. Certainly, there is nothing in the FSIA which

suggests that such a satisfaction procedure cannot be employed. Similarly, judgment creditors could take the information learned and institute proceedings directly in the foreign forum, another procedure not prohibited by the FSIA.

Finally, if Argentina's commercial assets are in the hands of a holder outside the United States, the federal courts sitting in New York are not without authority. There is personal jurisdiction over the banks and personal jurisdiction over Argentina. That being so, judgment creditors, armed with post-judgment discovery, can pursue a selection of post-judgment remedies in their attempts to have United States courts enforce their own judgments. Except for "attachment arrest and execution," nothing in the FSIA prohibits the employment of such procedures; indeed, § 1606 of the FSIA specifically states that the foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." In any such post-judgment proceeding, the holder and Argentina can muster whatever contrary arguments they have.

Of course, this Court need not now decide all the issues that might eventually arise from the employment of any of the post-judgment procedures. (Indeed, the Second Circuit made clear that it was reserving judgment on the question of whether the FSIA extends immunity to property held outside the United States. (*EM Ltd.*, 695 F.3d at 208.)) The question before the Court is whether the district court and the circuit court were correct in concluding that the post-judgment discovery sought here against a recalcitrant judgment debtor was consistent with the FSIA. (*see NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 n.4 (2d Cir.

2013) ("*NML II*"), *petition for cert. filed*, 82 U.S.L.W. 3515 (Feb. 18, 2014) (No. 13-990); *see also EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir.), *cert. denied*, 552 U.S. 818 (2007)). *Amici* respectfully submit that the answer to the question is yes.[4]

Argentina, as always, has a different view. Argentina asserts that the purpose of the FSIA is to protect the dignity of sovereign nations and that the discovery sought here would somehow undermine that dignity and unfairly burden the judgment debtor Argentina, despite the fact that there is no statutory language that would support such a proposition and that the subpoenas are directed at banks, not Argentina. In addition, this argument runs counter to § 1602 of the FSIA, which as a declaration of congressional purpose, states that the courts of this country are entrusted with the "claims of foreign states to immunity" based upon "the principles set forth in [the FSIA.]" In considering those claims, the courts are directed to address the needs of sovereigns *and* litigants alike in a manner designed to achieve the "interests of justice". Argentina's argument also overlooks the facts that Argentina has waived its sovereign immunity protections, ignored the judgments of the federal courts, and made public remarks of continued defiance that demonstrate a lack of respect for a judicial system Argentina itself chose. *See NML II*, 727 F.3d at 238 ("[A]t the February 27, 2013 oral argument, counsel for Argentina told the panel that it

4. The district court has made many modifications, including ordering the parties to narrow the scope of information sought by the subpoena to exclude information regarding assets located in Argentina since the parties recognized that no Argentine court would permit attachment of such assets. *See EM Ltd.*, 695 F.3d at 204-05.

'would not voluntarily obey' the district court's injunctions, even if those injunctions were upheld by this Court.").

ARGUMENT

As discussed below, Argentina has waived its sovereign immunity. The waivers here are very broad, extending to both jurisdictional and property immunity. Further, the FRCP, the post-judgment enforcement statutes of the various states (exemplified by New York's CPLR here), and the equitable remedies available to courts so that they can enforce their judgments, have all been utilized where appropriate as long as the subject court had personal and subject matter jurisdiction over the judgment debtor. Many of these post-judgment procedures long preceded the passage of the FSIA, which places little restraint on their use. This leads to the unmistakable inference that the Congress which passed the FSIA, knowing of the widespread use of these post-judgment procedures, made the conscious decision to place only certain, specified restrictions on the use of some of those procedures. A review of the language of the waivers, the relevant procedural rules, and the structure of the FSIA prove this inference correct.

I. Argentina Waived Sovereign Immunity Under The Terms of the Bond Agreements

The Fiscal Agency Agreement of 1994 ("FAA") governs all the bonds at issue here, as well as the bonds of the Individual Bondholder Judgment Creditors and others. *NML II*, 727 F.3d at 237. In the FAA, Argentina irrevocably waived all sovereign immunity defenses "to the fullest extent permitted by the laws of such jurisdiction . . .".

Joint Appendix ("JA") 106. This language has been interpreted to be a complete jurisdictional waiver with the surviving attachment immunity limited to commercial property utilized in the United States. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-31 (2d Cir. 2009), *cert. denied*, 599 U.S. 988 (2010).

Through the FAA, Argentina also "consents generally for the purposes of the [FSIA] to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment". JA 106-07. Thus, Argentina has specifically consented to "the giving of any relief" and "the issue of any process" in connection with the judgments here. The post-judgment discovery sought here is certainly within the ambit of Argentina's consent to "the giving of any relief".

As discussed in greater detail below, there is no provision in the FSIA – which is specifically embraced in the consent portion of the FAA (*EM Ltd.*, 695 F.3d at 203 n.1) – that purports to narrow or limit the discovery sought here. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53-54 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) ("*Rafidain II*") ("The waiver by a foreign state under section 1605(a)(2), rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets."); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379-380 (D.C. Cir. 2011). Normal rules of contractual construction require such specificity for the consent to be as limited as

Argentina now argues. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001) (refusing to accept narrow interpretation of arbitration clause in construction contract where language of contract did not support such a reading and limitation of waiver of immunity would have rendered the clause meaningless); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (arbitration clause covering "any controversy" would not be read to bar claims for punitive damages absent express language to the contrary).

II. The Federal Rules of Civil Procedure Permit Post-Judgment Discovery

The basic rule governing discovery in the courts of the United States is Federal Rule 26, which is entitled "Duty to Disclose, General Provisions Governing Discovery". The scope of discovery is governed by FRCP 26(b)(1), which empowers the courts of the United States to order discovery "of any matter relevant to the subject matter involved in the action" as long as the discovery "appears reasonably calculated to lead to the discovery of admissible evidence." FRCP 26(b)(1) discovery expressly includes the "location of documents or other tangible things . . ." While a party or any other person from whom discovery is sought can seek a protective order under Federal Rule 26(c), there can be little doubt that a party can seek discovery of documents and other tangible things regardless of where they are located if they are adjudged relevant to the proceeding. *See Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (under Federal Rule 26, "[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever

located."); *see also Minpeco, S.A. v. Hunt*, No. 81 CIV. 7619, 1989 WL 57704, at *2 (S.D.N.Y. May 24, 1989) (same).

The means of seeking such discovery is set forth in FRCP 34, which addresses document requests to parties, and FRCP 45, which addresses, among other things, documentary subpoenas to non-parties. A party affected by a third party subpoena can seek to modify or quash the subpoena, and a third party can seek similar relief. Both the party and non-party can argue a lack of relevance, non-application, cost and burden, confidentiality, violations of other laws, and a myriad of other concerns. The non-party banks have made such arguments to the lower courts here, and they were properly addressed.[5] There is certainly nothing in Rule 34 or Rule 45 that limits discovery to information or assets located in the United States. It would be all too easy, if this were the case, to relocate information and assets outside the United States to avoid discovery. For this reason, courts have permitted post-judgment discovery where it is at all relevant, as a matter of course. *See Rafidain II*, 281 F.3d at 54 ("Discovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure.").

FRCP 69 governs post-judgment remedies, and Rule 69(a)(2) specifically governs post-judgment discovery. The Rule states that any judgment creditor "may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located." Further,

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5. To the extent that Argentina is here complaining that the lower courts abused their discretion in allowing too much discovery, this question was not a question on which certiorari was granted. Thus, this question cannot now be raised. Sup. Ct. R. 14.1.

"proceedings supplementary to *and in aid of judgment* or execution" must accord with relevant state procedure. (emphasis added). Time and again, the courts of the United States have used Federal Rule 69 to conduct post-judgment discovery. *See Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993) ("[T]he remedies of a judgment creditor include the ability to question the judgment debtor about the nature and location of assets that might satisfy the judgment."); *Minpeco v. Hunt*, No. 81–CIV–7619, 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989) (*quoting National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982)) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located").

To be sure, Rule 69 procedures must aid "judgment or execution" and Argentina argues that the procedures cannot aid if there can be no execution. (Notably, Argentina neglects to mention "judgment"). (Argentina's Brief, p. 33). But the procedures can help to locate hitherto unknown assets *in* the United States that can be subject to execution in the United States, and can help to locate assets subject to execution in a foreign court.[6] On the basis of the information discovered, both parties and non-parties can possibly be ordered to comply with the array of post-judgment remedies available to the courts. All of these actions are an aid to collecting a judgment, even when there is no execution. In short, nothing could be clearer than the application of Rule 69 to the present circumstances.

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6. The limitations of foreign discovery are well set forth in the Amicus Brief of the United States (p. 13).

III. New York's Civil Practice Law and Rules Permit Post-Judgment Discovery

As set forth in FRCP 69, a court of the United States, sitting in New York, can employ the judgment enforcement rules of New York State in addition to the powers it possesses under the FRCP and the traditional equity powers of the federal courts. The applicable New York procedural rules are set forth in Article 52 of the CPLR entitled "Enforcement of Money Judgments." No less than fifty-two rules come under this Article. Several of these rules are of relevance here.

The principles of disclosure are set forth in the broadest terms in CPLR § 5223: "[T]he judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, ..." Obviously, the location of assets is "relevant to the satisfaction of the judgment . . . ." and New York courts have not been reticent in ordering post-judgment discovery where that standard is met. *See ICD Group, Inc. v. Israel Foreign Trade Co. (USA)*, 224 A.D.2d 293, 638 N.Y.S.2d 430 (1st Dep't 1996); *Ateni Maritime Corp. v. Great Marine Ltd.*, 225 A.D.2d 573, 573, 639 N.Y.S.2d 116, 117 (2d Dep't 1996); *Patterson, Belknap, Webb & Tyler, LLP v. Regia Mgmt. Corp.*, No. 97 CIV. 2624(HB), 1998 WL 788798, at *1 (S.D.N.Y. Nov. 10, 1998); *Raji v. Bank Sepah-Iran*, 139 Misc. 2d 1026, 1033, 529 N.Y.S.2d 420, 424 (Sup. Ct. N.Y. Cnty. 1988).

Post-judgment subpoenas are described in CPLR § 5224 and they include the comprehensive information subpoena, CPLR § 5224(a)(3), which can be served on either the judgment debtor or any other individual or entity possessing information pertinent to collection of judgment. Subdivision (a-1) makes absolutely clear that a person served with a documentary subpoena must produce

those materials "whether the materials sought are in the possession, custody or control of the subpoenaed person . . . *within or without the state*" (emphasis added). Not surprisingly, given this language, New York courts have ordered post-judgment discovery of great geographical breadth. *See Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 238 (S.D.N.Y. Oct. 5, 2011); *Aquavella v. Equivision, Inc.*, 181 Misc. 2d 322, 324, 694 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. Monroe Cnty. 1999), *appeal dismissed*, 270 A.D.2d 972 (4th Dep't 2000); *Harbor Footwear Grp., Ltd. v. ASA Trading, Inc.*, Index No. 11990–03, 2004 WL 235189, at *3 (N.Y. Sup. Ct. Nassau Cnty. 2004).

As to sanctions for failure to comply with any enforcement procedure, including post-judgment subpoenas, every court "shall have power to punish a contempt of court committed with respect to an enforcement procedure." CPLR § 5210. *See also* CPLR § 5251. This power has been used in situations involving inquiries into foreign assets. *See Gavilanes v. Matavosian*, 123 Misc. 2d 868, 873, 475 N.Y.S.2d 987, 991 (N.Y. City Civ. Ct. 1984).

The contempt power of CPLR §§ 5210 and 5251 extends to other enforcement devices, such as CPLR § 5225, *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 541, 883 N.Y.S.2d 763, 769 (2009); CPLR § 5222, *McCarthy v. Wachovia Bank, N.A.*, 759 F. Supp. 2d 265, 274 (E.D.N.Y. 2011); and CPLR § 5227, *see* 197 Siegel's Prac. Rev. 1 (May 2008); *cf. CIMC Raffles Offshore (Singapore) Ltd. v. Schahin Holding S.A.*, 942 F. Supp. 2d 425, 430 (S.D.N.Y. 2013).[7]

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7. While the United States cannot force a sovereign to comply with any post-judgment remedy imposed, the contempt power can be a powerful persuasive tool. *Richmark*, 959 F.2d. at 1478.

IV. The Courts' Equitable Powers Permit Post-Judgment Discovery

Long before the FRCP or the CPLR, our Federal Courts were recognized to have equitable powers arising out of the pre-Revolution powers of the English Chancery courts. *See, e.g.,* Brent McKnight, *How Shall We Then Reason – The Historical Setting of Equity,* 45 Mercer L. Rev. 919, 927-35 (1994). Those powers were used as appropriate, including efforts to aid judgment creditors in collecting on judgments rendered by the courts. *See Local Loan Co. v. Hunt,* 292 U.S. 234, 239 (1934) (it is well settled that "[A] federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein . . . ."). The use of those powers enhanced the perception of justice and fairness our courts have, and did much to preserve a judicial dignity that would have been eroded if there was a perception that our courts were unable or unwilling to enforce the judgments they reached.

In enforcing those judgments, courts used a variety of equitable powers, including the issuance of injunctions (*Deckert v. Independence Shares Corp.,* 311 U.S. 282, 290 (1940)), directing the levy of taxes (*Labette County Comm'rs v. U. S.,* 112 U.S. 217, 221-25 (1884)), and civil contempt (*Spallone v. U.S.,* 493 U.S. 265, 276 (1990); *Young v. U.S. ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 794 (1987); *Shillitani v. U.S.,* 384 U.S. 364, 370 (1966)). *See also Peacock v. Thomas* 516 U.S. 349, 356 (1996) ("[W]e have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement

of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances."); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (quoting *Swann v Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)) ("Where 'a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies'"). As was the case with Rule 69 and the various statutory post-judgment enforcement procedures utilized by the various States, Congress was aware of this long-term use of the equitable powers at the time the FSIA was enacted. To see the FSIA as a restriction on those inherent powers "would need much more clear guidance from Congress than we have..." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 745 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008).

Congress, aware of the foreign relations of the United States, could have curbed the judiciary's use of its equitable powers with respect to a sovereign's property, wherever located. Congress did not, except to curb the use of "attachment arrest, and execution" on some sovereign property located in the United States. Whether to apply other equitable powers, including post-judgment discovery, in aid of the enforcement of judgments is left to the discretion of the courts which ordered the judgments in the first place. Similarly, equitable powers can be employed against the sovereign if there is jurisdiction over the sovereign, as long as the exercise of those powers does not violate the FSIA's limited prohibitions.[8]

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8. In the eyes of Argentina, all of "its property remains presumptively immune from judicial enforcement unless it is both located in the United States and used for a commercial activity

This is the basic truth recognized by the Second Circuit when it rested its discovery decision on the traditional equitable power of the judiciary. *See EM Ltd.*, 695 F.3d at 208 ("[T]he district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments."). That court was completely correct in its reliance on *Riggs v. Johnson County*, 73 U.S. 166, 187 (1868) which clearly held that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree." *See also NML I*, 699 F.3d at 263 ("[T]he FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609."). While those powers can be limited by Congress, the limits Congress has set are far more circumspect than the almost complete immunity imagined by Argentina.

* * *

There can be little doubt that the courts of the United States have considerable power to enforce their judgments, and that that power is not automatically restrained by the boundaries of the United States. The only question is whether the FSIA prohibits the exercise of those powers when a foreign sovereign is involved.

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here." (Argentina's Brief, p. 20). This view does not square with the language of the FSIA or the scope of Argentina's own waivers.

Here, it must be stressed that when Congress passed the FSIA, it was certainly aware of the post-judgment enforcement powers that historically have been exercised by the federal and state courts. If the use of these historical powers were a concern to Congress, one would think that the Congress would have written language in the Act to curb those powers. And to some extent Congress did, making clear that *certain* of those powers could only be exercised in what were deemed to be appropriate circumstances. The Congressional "failure" to "curb" post-judgment discovery or other enforcement means should properly be interpreted as an endorsement of the pre-existing experience. With that thought in mind, it is useful to review the FSIA to see what it says and does not say.

V. The Foreign Sovereign Immunities Act Does Not Bar Post-Judgment Discovery

It can be agreed that the United States, for most of its constitutional history, observed a rule of near-absolute immunity for sovereigns, both as to jurisdiction and asset protection. (Argentina's Brief, pp. 3-4). It can also be agreed that the regime changed dramatically in 1952, when the Department of State changed its approach to sovereign immunity questions altogether. *Id.* Cases preceding this change have little meaning today.

Further, it can be agreed that in 1952, the United States abandoned the absolute immunity approach with respect to foreign sovereigns and instead adopted a restrictive approach instead with respect to jurisdictional immunity (but not property immunity, which remained absolute). (Argentina's Brief, p. 4). We can further agree

that application of this approach was entrusted to the Department of State, which basically dictated results to the judiciary with little regard for precedent. *Id.* This State Department-controlled era lasted until 1976 when Congress adopted the FSIA. *Id.* at 5. Thus, whatever occurred in the 1952-75 era is of little importance.

What matters is the FSIA, and more specifically the language thereof, since "foreign sovereign immunity is a matter of grace and comity on the part of the United States . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). This concept of "grace and comity" finds expression in the FSIA. There can be no question, under the FSIA, that the mantle of responsibility with regard to immunities was shifted from the Executive Branch to the Judicial Branch, which was instructed to apply the FSIA to specific questions under the guidance provided by the specific statutory language, the consents, if any, of the foreign sovereign, and the international agreements of the Unites States. (Argentina's Brief, p. 5). These questions included questions of both jurisdictional immunity and, for the first time, property immunity.

There can be no argument that the FSIA has little to say about discovery. It has nothing to say about "supplemental proceedings" in aid of judgment collection. *See* 28 U.S.C. § 1602 et seq. And it has nothing to say about discovery pertaining to sovereign assets. *Id.* From this absence, Argentina and its *amici* conclude that the FSIA affirmatively precludes post-judgment discovery, supplemental proceedings, or any attempts to locate assets outside of the United States so that they could be seized under the law of the appropriate forum. (Argentina's Brief, pp. 27-32). This conclusion ignores the statutory language that does exist,

the consents and conduct of the foreign sovereign at issue, and the dignity of our judicial system which this particular foreign sovereign has been defying and insulting in what amounts to an assault on the credibility of our jurisprudence. See *NML II*, 727 F.3d at 238 n.4.

In considering the language of the Act, the first and foremost provision in 28 U.S.C. § 1602, entitled "Findings and declaration of purpose". The first finding is that a *judicial* determination of a foreign immunity claim would both "serve the interests of justice" and "protect the rights of both foreign states and litigants in United States courts." *Id.* The shift to judicial determination and away from State Department discretion cannot be more clear. Equally clear are the concepts that such judicial determination should consider the needs of the sovereign and the involved litigants, not favor one over another, and should bear in mind the service of "the interests of justice". *Id.*

The second finding concerns international law: Sovereigns are not immune from jurisdiction as far as their commercial activities are concerned and their commercial property is available for judgment. *Id.* Nothing in this finding restricts the commercial activities to activities in the United States or the commercial property to property located in the United States. The inference that the courts of the United States can address extraterritorial activities and properties where appropriate is unmistakable.

The next provision, 28 U.S.C. §1603, is a definitional one. Notably, the definition of "commercial activity" in sub-section (d) is very broad. *Id.* More notably, sub-section (e) defines "commercial activity carried on in the United

States by a foreign state". *Id.* The Congress' perceived need to have separate definitions in (d) and (e) strongly suggests that the FSIA has a wider geographical scope than Argentina would have this Court believe.

Section 1604 sets forth the basic rule of jurisdictional immunity, and Section 1605 sets forth the exceptions which include Argentina's waiver of jurisdictional immunity here under 28 U.S.C. § 1605 (a)(1). Of direct interest here, however, is subdivision (a)(2) which makes exceptions for (i) acts performed in the United States but related to the commercial activity of the foreign state elsewhere; and (ii) acts committed "outside the territory of the United States" but having an effect in the United States. *Id.* Under either of these exceptions, the need for extraterritorial discovery is palpable: the relationship between the act and the commercial activity is essential for a judicial determination of a claim of jurisdictional immunity.

Also of interest is subdivision (g) entitled "Limitation on discovery". This provision basically states that a member of the Executive Branch, the Attorney General, can bar such discovery in a case involving a terrorist act. 28 U.S.C. § 1605A. The obvious inference is that it is courts which control discovery in all other cases, with no subject matter or territorial limitation.

Next is 28 U.S.C. § 1606. If the foreign state is not immune from jurisdiction, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances"; it hardly takes a flight of imagination to conclude this liability extends to the FSIA-consistent post-judgment collection efforts of a judgment

creditor, although Argentina argues that the placement of the language in the statutory scheme suggests that the provision only applies to jurisdictional immunity. But what good is establishing someone's liability without the ability to conduct post-judgment discovery? The concepts are inextricably intertwined.

Section 1609 sets forth the basic rule of "Immunity from attachment and execution of property of a foreign state" *i.e.*, that the property of foreign states in the United States is immune from the particular enumerated post-judgment remedies of "attachment arrest and execution" with the exceptions set forth in the trailing statutory provisions. This choice of language strongly suggests that other non-enumerated post-judgment remedies are available, wherever the property is located, but that the enumerated remedies are left to the applicable law of the nation in which the property is located.[9]

The exceptions to this circumscribed attachment immunity rule are set forth in Sections 1610 and 1611. There is no mention of post-judgment remedies other than attachment and execution, except insofar as the arrest of "vessels of a foreign state" is concerned: 28 U.S.C. § 1610(e). Nor is there any mention of discovery or "supplemental proceedings." Nor do either of the provisions address property outside the United States. The inference is that post-judgment remedies other than attachment arrest and execution can be used against property in the United

9. To circumvent this argument, Argentina contends that the words "attachment arrest and execution" should be read to include "supplemental proceedings", citing a House Report. (Argentina Brief, p. 6) Even if one assumes that a "supplemental proceeding" includes post-judgment discovery, the words of the House Report did not find their way into the statute.

States and all post-judgment remedies in accordance with foreign law can be utilized with respect to commercial property located outside the United States. Post-judgment discovery is not restricted, and it is fair to assume that the utilization of such discovery is best left to judicial discretion.

The silence regarding post-judgment discovery in the FSIA should not be read as an open invitation to place judicial restrictions on long-standing federal and state powers, and the use of equitable powers. Rather, the FSIA should only be found to impose such a restriction if the restriction can explicitly be found within the text of the statute itself. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011) (courts cannot construe a statute in a way that has "no basis or referent in [the statute's] language"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) (courts cannot interpret a statute in such a way that has "no basis whatever in the text . . . .").

Circling back to the purposes expressed in Section 1602, Argentina has unequivocally waived not only jurisdictional immunity but also "consented generally for the purposes of the FSIA to the giving of any relief . . . in connection with any Related Proceeding or Related Judgment." (JA 106-07). For more than a decade, Argentina has denied the plain meaning of its waivers, which obviously support the post-judgment discovery sought here. Whether judicial endorsement of this denial "serves the interests of justice" or the "needs of the litigants" are issues fairly considered in any analysis under the FSIA.

So too is the question of whether Argentina's conduct erodes the credibility of the courts of the United States. Argentina has ignored its contractual commitments, it has ignored the judgments entered into by United States courts and it has openly and publicly said that it will continue to ignore the orders of the courts of the United States. It cannot be correct to suggest that this rogue conduct is beyond reproach where an "interests of justice" analysis is required under the FSIA.

VI. Interpreting the Foreign Sovereign Immunities Act as Restricting Post-Judgment Discovery Would Violate Rules of Statutory Construction

Anytime the Congress passes new and comprehensive legislation, it changes the law. In thus changing the law, Congress raises the question of the extent to which pre-existing law in the area has been changed. When a provision in the legislation makes a specific change in pre-existing law, the judicial task is an easy one. Where the legislation is absolutely silent with respect to pre-existing law, the question becomes one of whether the pre-existing law is compatible with the aims and purposes of the legislation.

When analyzing whether a federal statute pre-empts federal law, courts look to whether "the statute '[speaks] directly to [the] question' otherwise answered by federal . . . law." *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-237 (1985) (common law remedies of Native Americans not pre-empted by Non-Intercourse Act); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Dist. of Iowa*, 482 U.S. 522, 529 (1987) (FRCP not

pre- mpted by Hague Convention because no language in v ention explicitly supercedes FRCP on subject of discovery.) State common and statutory law is only superseded by federal legislation when Congress has exhibited a "clear and manifest" intent to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). If the statute is silent as to pre-existing federal law or pre-existing state remedies, the presumption is that Congress did not intend to displace it. *See Samantar v. Yousuf*, 560 U.S. 305, 310 (2010) (no language in FSIA displacing common law claim against a foreign government official); *Oneida County, N.Y.*, 470 U.S. at 240; *Jones*, 430 U.S. 519, 525 (1977). The same holds true for the court's traditional equitable powers. Absent "the clearest command to the contrary from Congress, federal courts retain their equitable power....". *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see also Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

Before 1976, the property of a foreign sovereign was essentially immune from any post-judgment remedy, first because of the absolute immunity rule and secondly because of the manner in which the State Department exercised the discretion accorded to it in the 1952-75 period. In 1976, however assets of a judgment debtor, wherever located, become subject to post-judgment discovery.

When the FSIA legislation passed, the Congress unequivocally said that the assets of a foreign sovereign were immune from "attachment arrest and execution" unless certain conditions were met. The determination of whether the conditions were met was a judicial one,

and the assets of a foreign sovereign were no longer absolutely immune but instead certain assets had a clearly circumscribed immunity from specified remedies. On the other hand, the same Congress said nothing about post-judgment discovery or the array of other post-judgment remedies that have been long available to courts so that they might enforce their judgments. This rejection of some post-judgment procedures, and the implicit acceptance of others, seems to be a classic legislative approach designed to balance the needs of private litigants and foreign sovereigns.

The legislative history of the FSIA only bolsters the argument that Congress did not intend to limit post-judgment discovery by enacting the FSIA. The House Report for the FSIA states that "[t]he b ll does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area." H.R. REP. 94-1487, 23, 1976 U.S.C.C.A.N. 6604, 6621. This language could not be clearer.

The legislative intent conclusion seems inescapable. It is the courts, not the executive, that will make decisions. And they will do so in accordance with the language of the FSIA. That language clearly says that certain post-judgment procedures are excluded in certain circumstances. Any other post-judgment procedure, including post-judgment discovery, can be utilized if the court addressing the issue believes that utilization to be an appropriate exercise of its inherent power to enforce judgments, bearing in mind the stated purposes of the FSIA - - to serve the "interests of justice".

Tacitly recognizing that the virtual elimination of post-judgment discovery is unattainable, the Amicus Brief of the United States reluctantly concedes that Congress may have contemplated that "some limited discovery in aid of execution" should occur. (U.S. Brief, p. 7). It then suggests that such discovery be allowed when "there is a reasonable basis to believe that an exception to immunity exists." (U.S. Brief, p. 12). This formulation is inherently unworkable and unfair, particularly to investors who are not well-funded. It is almost impossible to know whether an asset is, or is not, exempt from immunity unless one knows more about the nature of the asset and its use, not to mention its existence.

In support of this approach, the United States cites three cases, *Walters v. Indus. and Commercial Bank of China Ltd.*, 651 F.3d 280 (2d Cir. 2011); *Walker Int'l Holdings Ltd v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); and *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

Walters and *Walker* are strange choices. In *Walters*, the Second Circuit clearly said that the issue of asset discovery outside the U.S. had not been appealed. 651 F.3d at 297. In *Walker*, the issue was not about discovery; it was about whether a security bond located in the United States was subject to attachment in the United States - - a question which turned on whether it had been used commercially in the United States. 395 F.3d at 236. Discovery was not the issue in either case.

The Seventh Circuit's decision in *Rubin* has little application here. Its threshold holding was that a court

must address immunity questions, whether or not immunity issues were raised by the sovereign. 637 F.3d at 799. Thus, the district court's decision to attach various antiquities, without addressing whether or not those antiquities were immune from attachment under § 1610 of the FSIA, was plain error. *Id.* at 801.

The second part of the decision concerned the district court's determination that the plaintiffs could conduct general discovery of all the sovereign's assets in the United States. In reversing the district court, the Seventh Circuit adopted, without any real analysis of the FSIA or the judiciary's equitable powers, the approach argued here by the United States. Beyond plain error, a distinguishing feature in *Rubin* rendering the case inapplicable here was that the sovereign (Iran) had *not* waived its jurisdictional and property immunities to the fullest extent permitted by law, as the Republic has here.

VII. Argentina's Extra-Legal Arguments Are Inadequate to Bar Discovery

In addition to its inverted view of the meaning of the absence of discovery language in the FSIA, Argentina argues that the Second Circuit's holding is inconsistent with the "principles of foreign sovereign immunity" in three different ways: (i) foreign states are entitled to "grace and comity" in the courts of the United States; (ii) the FSIA is intended to protect foreign states from attendant litigation burdens, such as discovery; and (iii) the reciprocal interests of the United States. (Argentina's Brief, pp. 23-24; 39-50). These arguments fail for several reasons.

First, Argentina's reading of *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812), is flawed. In that case, the opinion of the Supreme Court stated clearly that a foreign sovereign who brings commercial assets into our territory has submitted fully and completely to the jurisdiction of the United States, while a different rule applies when that asset is a public asset, such as the warship that was at issue there. *Id.* at 144. The holding primarily rests on the Court's perception that the foreign relations of an infant country would be damaged by a seizure that was otherwise justified. "Grace and comity" had little to do with the decision. Nor should it have anything to do with the decision here where Argentina has come into this country and waived its various immunities in order to attract capital. As this Court has observed, there is a comity interest in allowing a foreign state to use its own courts[10] to resolve disputes and it offends the dignity of those courts if they are bypassed without good cause. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). Those concerns do not apply where the foreign sovereign has agreed to a determination by a court of the United States (and has closed its own courts). *See First City, N.A. v. Rafidain Bank* ("*Rafidain I*"), 150 F.3d 172, 177 (2d Cir. 1998), *aff'd*, 281 F.3d 48 (2d Cir. 2002). Argentina "wants our law . . . but wants our law free from the claims of justice." *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 361-62 (1955) (Frankfurter, J.).

Second, taken to its logical conclusion, the absence of discovery language in the FSIA means (at least to

10. However, the Second Circuit observed that the Argentine courts are closed to all the bondholders. *NML I*, 699 F.3d at 254, 260, and 262.

Argentina) that sovereigns should not be subjected to any discovery because it would be burdensome. Not so. Argentina consented to being sued here, and stipulated the application of New York law in an agreement that itself drafted. To argue that it should be relieved of normal discovery if it is sued is astounding. The burdens have been wilfully taken up. If the burdens prove too heavy, relief can be sought and indeed the banks have tried to seek such relief. The failure to convince the district court and the court of appeals that the discovery ordered here remains too burdensome is hardly "inconsistent with the immunity framework set forth in the FSIA." (Argentina's Brief, p. 39).

Third, although the "reciprocal interests of the United States" are a valid consideration (Argentina's Brief, p. 48), these interests must be evaluated in context. Indeed, an example of the United States conducting itself in a manner that would implicate this consideration is beyond the imagination.

In reality, the United States would not act as Argentina has, and most foreign jurisdictions would have no reason to be concerned with matters like post-judgment discovery. If the United States acted as Argentina has, foreign courts would presumably look to their immunities law, and the scope of the waivers given by the United States, to see if such discovery were warranted. While the possibility that Argentina would act in a vengeful manner exists, as its saber-rattling in the Second Circuit suggests, this is not a fear that should govern this Court's consideration of the interests of the United States.

CONCLUSION

For the reasons above, the Individual Bondholder Judgment Creditors ask that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

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AMICUS CURIAE BRIEF

RECORD AND 1 BRIEFS

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In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE JUDICIAL CRISIS NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Crisis Network ("JCN") is dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers: a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JCN promotes these constitutional principles at every level and branch of government, focusing on legislative and legal efforts opposing attempts to undermine the rule of law, expand the power of government, politicize the enforcement of the law, threaten American sovereignty, supplant American law with foreign or international law; or bias the legal system on behalf of politically favored groups or individuals. JCN's efforts are conducted through various outlets, including print, broadcast, and internet media, and through educating and organizing citizens to participate in this mission.

SUMMARY OF ARGUMENT

Argentina marketed the bonds at issue in this case by promising to waive its sovereign immunity to suit as well as its immunity to attachment and execution of any property located anywhere in the world. Now Argentina is attempting to go back on those promises by arguing that the Foreign Sovereign Immunities Act

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. The Respondent has filed blanket consent with the Court, and the written consent of Petitioner accompanies this brief. No counsel for a party authored this brief in whole or in part. No person, other than amicus curiae, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

("FSIA") confers an attachment and execution immunity that is nonwaivable as to property located outside the United States. This novel reading of the FSIA—to create a sort of nonwaivable super-immunity—is inventive, but it directly contravenes the principles of sovereign immunity and the nearly two centuries of common law practice that inform the FSIA's provisions. What is more, it finds no support in the text, history, or purpose of the statute.

In its essence, sovereign immunity is a personal privilege against liability without consent. See *Clark v. Barnard,* 108 U.S. 436, 447 (1883). Since the doctrine made its first appearance in American law in 1812, this Court has consistently held that a foreign state may waive its immunity in its discretion. Courts have long understood immunity as waivable to whatever extent and in whatever manner the sovereign chooses, precisely because it is a discretionary sovereign privilege.

Argentina would have this Court abandon these longstanding principles in favor of its new theory of nonwaivable super-immunity. But nothing in the FSIA supports this result. The text announces no new rule conferring, or addressing the waiver of, attachment and execution immunity for property located outside the United States. Similarly, neither the statute's purpose nor history reflects any intention to *expand* a foreign state's ability to protect its assets. Rather, the FSIA enacted the *restrictive* view of sovereign immunity, which limits the ability of foreign states to claim immunity for commercial activities. There is no reason to think that in codifying the more narrow theory of foreign sovereign immunity, Congress meant to create

a nonwaivable immunity from attachment and execution. The statute was instead passed to give the Judiciary, rather than the Executive, the authority to decide when a foreign sovereign was subject to liability when it had not waived its immunity.

This Court has repeatedly instructed that statutes enacted against a set of settled common law principles should not be read to alter those principles unless the text says so affirmatively, or the background rules are clearly contrary to the statute's purpose. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993). Argentina's reading of the FSIA would turn textual silence into an entirely new immunity doctrine, one radically out of step with existing precedent and law. If Argentina wants to avoid its bond obligations, it cannot claim the FSIA's support in doing so.

The United States and Argentina also argue that discovery may only extend to assets subject to an exception from the immunity afforded by the FSIA. U.S. Br. at 15; Pet. Br. 26-32. Even if the FSIA can be read to prevent a foreign state from waiving its immunity from attachment and execution, this position is incorrect. The FSIA does not impose discovery limits beyond those required by the Federal Rules of Civil Procedure. And there is no reason to think, even if additional limitations somehow applied, that such limits would be nonwaivable.

ARGUMENT

I. Section 1609 Of The FSIA Does Not Grant A Nonwaivable Immunity

When it issued the bonds at the center of this case, Argentina waived all immunity from suit as well as immunity from attachment and execution of any and all of its "assets or properties" located anywhere in the world. Specifically, Argentina entered the following waiver:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity . . . from attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted . . . (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

Pet. App. 4 & N.1.

This waiver is clear and unequivocal, without limitation based on geography or class of property. But now Argentina is attempting to renege on its pledge by claiming that the Foreign Sovereign Immunities Act of 1976 ("FSIA") limits the authority of United States courts to attach or execute the property of foreign sovereigns to only that property located within the United States. In effect, Argentina is arguing that the

FSIA gives it a form of nonwaivable, super-sovereign immunity as to its property and assets. That claim is entirely at odds with the principles of sovereign immunity and the common law concept of restrictive immunity the FSIA codifies. And it finds no support in the text, history, or purpose of the FSIA itself. This Court should reject Argentina's novel theory of super-immunity.

A. Historical Practice Reflects That Sovereign Immunity Could Be Waived

At its heart, sovereign immunity "is the privilege of the sovereign not to be sued without its consent." *Virginia Office for Prot. and Advocacy v. Stewart*, 131 S.Ct. 1632, 1637 (2011); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) (A sovereign "cannot be sued without its consent"). The foreign version of the doctrine is rooted in the principle of comity, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), and made its first appearance in this country long before the FSIA, in Chief Justice Marshall's opinion for the Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, Chief Justice Marshall explained that "[a] foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation." *Id.* at 137. Or as this Court has subsequently put it, sovereign immunity is "a personal privilege" against nonconsensual liability. *Clark v. Barnard,* 108 U.S. 436, 447 (1883).

But precisely because immunity is a sovereign privilege, it may be waived by the sovereign "at [its] pleasure." *Id.* Indeed, the Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that one of the most basic

principles of sovereign immunity is that it "bars suit only in the absence of consent." *Id.* at 755. That is to say, sovereign immunity is neither inalienable nor unlimited: it protects only the *nonconsenting* sovereign. *Id.* at 755-56; *see Clark*, 108 U.S. at 447.

It is therefore unsurprising that prior to the enactment of the FSIA, federal courts routinely exercised jurisdiction over consenting foreign states. *See, e.g., Porto Rico v. Ramos*, 232 U.S. 627 (1914) (consent); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916) (waiver); *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (counter-claim); *see also* Restatement (Second) of Foreign Relations Law § 70 (1965) (foreign states are entitled to waive immunity by treaty, by contracting with a private party, and by counterclaiming). This jurisdiction derived from the inherent authority of a foreign state to waive the immunities to which it is otherwise entitled.

Moreover, under both the absolute and restrictive theories of sovereign immunity that pre-dated the FSIA, the ability of a foreign state to consent to suit was not limited to the fact of suit itself but included the ability to waive immunity to attachment and execution of property. The Fourth Circuit's decision in *Flota Maritima Browning De Cuba, Sociadad Anonima v. Motor Vessel Ciudad De La Habana*, 335 F.2d 619 (4th Cir. 1964) is instructive. In that case, the court of appeals allowed a foreign state to waive its execution immunity. The Fourth Circuit began by acknowledging the distinction "between jurisdictional immunity and immunity from execution of the property of a sovereign" and noted that "waiver of the former is not

necessarily a waiver of the latter." *Id.* at 626. Nevertheless, the court concluded that "the difference between the jurisdictional immunity of the Sovereign and that of his property from execution is unavailing to the Republic of Cuba here, for *both were waived*." *Id.* (emphasis added).

The Restatement similarly sanctioned waivers as to the common law immunities, including the common law immunity from attachment and execution. Restatement (Second) of Foreign Relations Law § 70 (1965). "A foreign state may waive the immunity to which it is entitled . . . by international agreement or by agreement with a private party, including an agreement made before the institution of proceedings." *Id.* The Restatement drafters took care to note that courts should not imply a waiver of execution from a waiver of immunity to suit, *id.* at § 70(3), but the drafters were clear that execution and attachment immunity may be expressly waived based on "the reasonable interpretation of the intended effect of the waiver," *id.* at cmt. c.

It was just as well-settled at common law that immunity, both as to jurisdiction and as to attachment and execution, could be waived by treaty. *See Et Ve Balik Kurumu v. B.N.S. Intern. Sales Corp.*, 204 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1960). Between 1948 and 1958, for example, the Department of State negotiated fourteen treaties, each providing that, for business activities in the territory of the other, the signatory nations could not claim or enjoy immunity from suit or immunity from execution upon their property. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354,

358 (2d Cir. 1964); Restatement (Second) of Foreign Relations Law § 69 cmt. 2 (1965). These treaties sought to put the business dealings of foreign states on footing equal with private business activities.[2] Similarly, in 1958, the United States ratified the Convention on the Territorial Sea and the Contiguous Zone, which provided that government vessels operated for commercial purposes were subject to the same enforcement measures as private vessels. Restatement (Second) of Foreign Relations Law § 69 cmt. 2 (1965) (citing U.N.Doc. A/Conf.13/L.38, 38 Dep't State Bull 1111 (1958), 52 Am. J. Int'l L. 83 (1958)).

B. The FSIA Does Not Alter The Longstanding Principle That Sovereign Immunity May Be Waived

Argentina contends that the FSIA somehow abrogated these fundamental principles of sovereign immunity—and nearly two centuries of common law practice—by making attachment and execution immunity nonwaivable as to property located outside

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[2] A typical provision waived immunity as to suit and as to execution, thus putting the business dealings of foreign states on equal footing with privately owned business activities. The Treaty of Friendship, Commerce and Navigation between the United States and Italy, for example, provided that the signatories would not "claim or enjoy, either for [themselves] or for [their] property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein." Treaty of Friendship, Commerce and Navigation, U.S.-Italy, Feb. 2, 1948, 63 Stat. 2255, art. XXIV, para. 6. *See also Victory Transport*, 336 F.2d 354, 364 n.15 (citing Friendship, Commerce and Navigation Treaty, US-Israel, Aug. 23, 1951, 5 U.S.T. 550, art. XVIII, para. 3).

the United States. This theory finds no support in the plain text of the statute or its historical background.

The text of the FSIA codifies the restrictive theory of sovereign immunity. In so doing, it retains the two forms of sovereign immunity recognized at common law: immunity from suit and immunity from attachment and execution. Section 1604 codifies the general rule of immunity from suit: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except as otherwise provided in the Act. 28 U.S.C. § 1604. Section 1605 codifies the companion rule that a sovereign may "waive[] its immunity either expressly or by implication" and thereby subject itself to the jurisdiction of U.S. courts. 28 U.S.C. § 1605. When this exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Finally, Sections 1609 and 1610 address immunity from attachment and execution for property located in the United States. Section 1609 states the general rule of immunity for such property, 28 U.S.C. § 1609, while Section 1610 makes clear, again in keeping with the familiar "common-law principle," *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 793 (7th Cir. 2011), that foreign sovereigns may waive attachment and execution immunity expressly or impliedly. 28 U.S.C. § 1610.

Argentina claims that because Sections 1609 and 1610 refer only to property located within the United States, the FSIA abrogates the common law rule that sovereigns may waive immunity as to property located in other locations. Two courts of appeal have embraced

this contention, *see EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 481 n.19 (2d Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002), holding that property must both be located within the United States and used for commercial purposes before a foreign state's waiver of immunity will be effective in U.S. courts.

But this interpretation reads language into the text that is simply not there. Section 1609 does not provide that a foreign sovereign has immunity as to property located outside the United States. Far from it: Section 1609 has precisely nothing to say on this topic. Section 1610(a) is similarly silent on the question of waiver as to property located beyond U.S. borders. Given the preexisting common law practice and the longstanding principles of sovereign immunity, the appropriate inference from this statutory silence is not that Congress abolished the usual rules of waiver, but that it left them where they lay.

This Court has instructed that statutes enacted against a common law background "are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993). The FSIA is one of those statutes. This Court has repeatedly recognized that the FSIA "codified" the "restrictive theory" of sovereign immunity. *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); *Austria v. Altmann*, 541 U.S. 677, 691 (2004); *Verlinden*, 461 U.S. at 488. As recently as 2010, the Court noted that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in

1976." *Samantar*, 560 U.S. at 311. Consequently, in keeping with this Court's canons of interpretation, the FSIA's silence as to property located outside the United States should not be interpreted to abolish the pre-existing common law rule, applied in connection with the restrictive theory, that immunity as to attachment and execution of such property could be waived. *See Norfolk Redev. & Housing Auth. v. C. & P. Tel. Co.*, 464 U.S. 30, 35–36 (1983) (statutes presumed not to abolish background common law principles).

There is nothing in the purpose of the statute that would indicate otherwise. On the contrary, the history of the FSIA confirms that the statute leaves firmly in place the common law rule that, under the "restrictive theory" codified by the FSIA, attachment and execution immunity may be waived. By codifying the "restrictive" theory of sovereign immunity, the FSIA was intended to remove political considerations from the immunity determination. *Verlinden*, 461 U.S. at 488. For a century and half, the United States generally accorded "absolute" immunity in all actions against friendly foreign sovereigns. That changed in 1952: In the so-called Tate Letter, the State Department adopted what it called a "restrictive" theory of foreign sovereign immunity. Going forward, foreign sovereign immunity would be "confined to suits involving the foreign sovereign's public acts, and [would] not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487.

The new "restrictive" theory of foreign sovereign immunity proved "troublesome" in application. *Id.*; *Samantar*, 560 U.S. at 312; *Altmann*, 541 U.S. at 690-

91. The responsibility for determining whether immunity existed under the new standard fell to the Executive Branch. When named as a party to a suit, a foreign state could request that the State Department issue a suggestion of immunity. If the State Department did so, the court would be obliged to dismiss. As a result, foreign nations routinely brought pressure to bear on Executive Branch officials, and "political considerations" sometimes led to "suggestions of immunity in cases where immunity would not [otherwise] have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487. To complicate matters further, foreign states did not always contact the State Department, and in these cases, the federal courts were required to determine whether sovereign immunity existed without Executive Branch guidance. *Id.* As a consequence, foreign sovereign immunity determinations became inconsistent. The "governing standards were neither clear nor uniformly applied" and questions of sovereign immunity were resolved "in two different branches, subject to a variety of factors ... including diplomatic considerations." *Id.* at 488.

Congress passed the FSIA to provide a uniform set of standards for determining whether sovereign immunity existed. The FSIA, this Court has explained, was enacted "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that ... decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, p.7 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6604). Section 1602 of the FSIA lays out the Act's two main purposes: (1) to codify the restrictive theory of

sovereign immunity; and (2) to remove politics from the immunity determination, so that claims of sovereign immunity would be decided by the courts.

The FSIA expresses no intention to modify the substantive common law rules governing immunity and waiver. Indeed, the so-called restrictive theory of immunity the FSIA codifies was developed to address the question of immunity *in the absence of consent*. The Tate Letter of 1952 set out a policy for "granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent." Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't of State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.). In adopting the "restrictive" theory of foreign sovereign immunity, the State Department announced that such immunity "should no longer be granted in certain types of cases." *Id.* But as the Tate Letter explained, even under the "absolute" theory of sovereign immunity, consent subjected a sovereign to the courts of another sovereign. *Id.* The new, restrictive theory distinguished between public and private acts, according immunity only for the former, but it in no way diminished the ability of a sovereign to waive the immunity that still existed under the restrictive theory. *See id.*

In view of this robust and longstanding common law background, it is, as the United States aptly puts it in its brief in this case, "particularly unlikely that Congress would have silently undertaken such a

radical departure from established norms in the context of a statute so highly sensitive to comity and reciprocity concerns and the dignity of foreign states." U.S. Br. 23. Nothing about the text of the FSIA, its history, or its purpose suggests that Congress meant to adopt the restrictive theory of immunity, yet create an unprecedented super-immunity for attachment and execution. And the common-law principles against which the FSIA was enacted foreclose Argentina's claim to a novel, super-immunity from attachment and execution of property outside the United States.

Foreign-sovereign immunity has always been based on "reciprocal self-interest [ ] and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955). Argentina's attempt to escape its contractual obligations here should not obscure the fact that to confer on foreign sovereigns a nonwaivable, super-sovereign immunity would have the ironic consequence of diminishing those sovereign's prerogatives rather than vindicating them. In the end, sovereign immunity is about consent. *See Stewart*, 131 S.Ct. at 1637 (sovereign immunity "is the privilege of the sovereign not to be sued without its consent."). Argentina has consented here. Its attempt to rewrite the FSIA should not excuse it from the consequences.

II. The FSIA Does Not Make Post-Judgment Discovery Immunity Nonwaivable

The United States argues that discovery "must be tailored in a manner that respects the general rule of immunity from execution set forth in Section 1609 and may extend only to assets as to which there is a reasonable basis to believe that an exception to

immunity under Section 1610 applies." U.S. Br. 15; *see also* Pet. Br. 26-32. Even assuming that the FSIA prevents a foreign state from waiving its immunity from attachment and execution (it does not), the United States' position is incorrect for two reasons. First, the text, structure, and history of the FSIA all indicate that the statute does not impose discovery limits beyond those required by the Federal Rules of Civil Procedure. Second, even if the FSIA could be read to impose additional constraints upon the discovery process, there is no reason to think that such limits would be nonwaivable.

The Government and Argentina agree that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15. That is putting it mildly. The FSIA barely mentions discovery at all and the ordinary tools of statutory interpretation indicate that Congress did not intend to limit the post-judgment discovery routinely available to judgment creditors.

Argentina and the Government extrapolate discovery limitations from the execution immunity conferred by Section 1609 and the exceptions to that immunity conferred by Section 1610. But those provisions say nothing about discovery. Indeed, the only provision of the FSIA that addresses discovery authorizes a stay in certain terrorism cases where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g)(1). The plain text of the FSIA thus fails to limit discovery.

Further, when Congress wanted to replace the normal rules of civil procedure in the FSIA, it did so

expressly. *See Samantar*, 560 U.S. at 317. Consider Section 1608. The provision specifically alters the usual rules of service. That Congress did not similarly address discovery suggests Congress did not intend to replace its usual rules. If Congress had intended to alter those rules, it would have said so. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341-42 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Further, for the immunities recognized by the FSIA—immunity from suit and from post-judgment attachment and execution—Congress was careful to delineate the breadth of those immunities. That Congress not only failed textually to provide an immunity from discovery, but also was silent as to the scope of and limitations on any such immunity indicates Congress did not intend to create an immunity from discovery.

Legislative history also makes clear that the FSIA "does not attempt to deal with questions of discovery," H.R. Rep. No. 94–1487, p. 23 (1976), much less create a nonwaivable super-immunity from discovery. This is because, as the House Report explains, "[e]xisting law appears to be adequate in this area:" "if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply." *Id.* As the D.C. Circuit has held, instead of limiting discovery or making these limitations nonwaivable, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC v.*

Democratic Republic of Congo, 637 F.3d 373, 378 (D.C. Cir. 2011); *Samantar*, 560 U.S. at 328 (Scalia, J., concurring in the judgment) (history indicates Congress' "failure to deal with discovery").

Even if the FSIA limits post-judgment discovery, Argentina waived those limitations. In its offering to bondholders, Argentina waived its immunity "to the fullest extent allowed under the law." Pet. App. 4 & n.1. Argentina further told prospective bondholders that it would "consent[] generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment." Pet. App. 4 & n.1. This waiver covers the waterfront. It certainly encompasses post-judgment discovery—a process related to a judgment.

The text of the FSIA does not indicate that, if an immunity from discovery were implied, Congress would intend that immunity to be nonwaivable. With every grant of immunity, Congress ordinarily included a corresponding provision that the immunity could be waived. *See* 28 U.S.C. § 1605(a)(1); 28 U.S.C. § 1610(a)(1). If post-judgment discovery immunity were implicit in any grant of immunity, an exception for waiver would likewise be implicit. But, as noted above, Congress's decision not to confer an immunity from discovery should be the end of the matter. As this Court has explained, "'[d]rawing meaning from silence is particularly inappropriate ... [when] Congress has shown that it knows how to [address an issue] in express terms.'" *Samantar*, 560 U.S. at 317 (alteration in original) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

The FSIA reflects Congress's deliberate balance between the interests of foreign states and the interests of those with claims against these states. The admittedly important concerns regarding foreign relations and comity are adequately addressed through the Federal Rules of Civil Procedure. Indeed, in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987), a case against a foreign state with similar international implications, this Court declined to limit discovery in light of comity. The federal district courts, this Court wrote, were up to the task; they were to "exercise special vigilance to protect foreign litigants" and to supervise proceedings "particularly closely to prevent discovery abuses." *Société Nationale*, 482 U.S. at 546. The demands of comity in suits had long been part of civil litigation, and this Court declined to "articulate specific rules to guide this delicate task of adjudication." *Id.* (citing *Hilton v. Guyot*, 159 U.S. 113 (1895).

The Second Circuit held that the discovery order at issue "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all." Pet. App. 15. Whether NML may attach or otherwise affect property is a question for another day. If NML attempts to execute against Argentina's property, the legality of that attachment will be governed by the laws of the country in which the property is located, and Argentina "will be protected by principles of sovereign immunity ... to the extent that immunity has not been waived." Pet. App. 20. The normal rules regarding privileged and confidential information, personal jurisdiction, the presumption against extraterritoriality, and the

district court's broad authority over discovery, which may include comity interests, may well limit post-judgment discovery. *See Société Nationale*, 482 U.S. at 543-44. But those questions are not at issue here.

CONCLUSION

For the reasons listed above, Argentina may not rely upon a nonwaivable immunity from attachment and execution to short-circuit the post-judgment litigation processes it consented to expressly. This Court should affirm the decision of the court below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE JUDICIAL EDUCATION PROJECT AND PROFESSORS OF LAW IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Federal Rule of Civil Procedure 69(a)(2) authorizes a judgment creditor to obtain discovery from any person, including the judgment debtor, in aid of the judgment or execution. The question presented is whether, in cases where the judgment debtor is a foreign state, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1601 *et seq.*, restricts Rule 69(a)(2) only to discovery about specified assets subject to execution in the United States.

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae have a strong interest in the proper construction of the Foreign Sovereign Immunities Act and the Federal Rules of Civil Procedure. *Amici* law professors, who are listed in Appendix A, have taught and written extensively on foreign sovereign immunity, international civil litigation and international law. *Amicus* Judicial Education Project ("JEP") is a non-profit educational organization in Washington, D.C. JEP is dedicated to defending the Constitution as envisioned by the Framers – a federal government of enumerated powers, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe statutes and the impact of court rulings on the nation. JEP undertakes these efforts by various means, including filing briefs in this Court on matters of national importance.

SUMMARY OF ARGUMENT

In the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1601 *et al.*, Congress designed a comprehensive scheme regulating the limits of a foreign state's immunity from civil suit. Nowhere does this comprehensive statutory scheme immunize foreign states from the post-judgment discovery

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici*, their members or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein. All parties have consented to the filing of this brief. Respondent has filed a blanket consent letter with the Clerk's Office. Petitioner's specific consent letter is being filed with this brief.

ordinarily available to judgment creditors under Federal Rule of Civil Procedure 69. Despite the complete absence of any statutory basis, Petitioner invokes sovereign immunity in an effort to block discovery about assets that might be used to satisfy valid judgments against it.

In its merits brief, Respondent offers various case-specific reasons, also identified by the Second Circuit, why Petitioner's argument is incorrect. These include the waiver contained in Petitioner's bond documents and the fact that the discovery is directed against third parties rather than Petitioner itself. *Amici* endorse these arguments.

In this brief, *amici* explain why the result would be the same even absent these case-specific factors. The FSIA does not erect independent limits to post-judgment discovery in cases where a court has validly exercised jurisdiction over a foreign state. This rule follows from faithful application of statutory interpretation techniques that have guided this Court in cases under the FSIA and other federal statutes. As an initial matter, nothing in the plain text of the FSIA limits post-judgment discovery under Rule 69(a)(2).

What the FSIA's text suggests, its structure confirms. Provisions of both the FSIA and other statutes demonstrate that Congress knows how to embed limits on discovery into federal law. More generally, when Congress wished to alter the otherwise applicable rules of civil procedure in cases against foreign states, it did so, as the provisions governing personal jurisdiction and service of process exemplify. While Petitioner and its *amici* lay great weight on the FSIA's limits on property subject to execution, that argument erroneously ties the scope of a court's power to order post-judgment discovery to its power to issue a writ of

execution, a linkage supported neither by the FSIA nor by Rule 69(a)(2).

The FSIA's legislative history resolves any lingering doubt about the availability of discovery from foreign states. In that history, committee reports from both houses make clear that Congress deliberately chose not to regulate discovery in the original enactment. This statutory lacuna was not due to some legislative oversight or lack of political consensus. Instead, according to reports from the House and Senate Judiciary Committees, Congress deliberately chose not to address discovery in the FSIA because "[e]xisting law appears to be adequate in this area." H.R. Rep. No. 94-1487, at 23 (1976) [hereinafter *House Judiciary Committee Report*]; S. Rep. No. 94-1310, at 9 (1976) [hereinafter *Senate Judiciary Committee Report*]. That "existing law" included Rule 69, which had been amended only a few years earlier to ensure that "all discovery procedures provided in the rules are available." Fed. R. Civ. P. 69 advisory committee's note (1970). In light of the close proximity between the revisions to Rule 69 and Congress's consideration of the FSIA, it defies reason to think that Congress somehow intended to exempt foreign states from the ordinary obligations of judgment debtors to provide post-judgment discovery without addressing the matter anywhere in the legislation.

Finally, the purposes behind the FSIA's enactment support this conclusion. A core purpose of the FSIA was to provide meaningful relief to private litigants, including foreign litigants, in cases against foreign states where an exception to the immunity applies. These cases specifically include claims by holders of sovereign debt. Congress considered, but rejected, a version of the bill that would have preserved the

immunity for foreign states in certain cases involving public debt. In such instances, like this one, post-judgment discovery becomes an essential tool to ensure that noteholders do not lack a remedy. Imposing undue limits on such discovery thwarts this purpose.

Petitioner's appeal to "principles" animating the FSIA does not justify a different interpretation of the statute. Resort to such "principles" is fraught with peril, for it risks according the statute a meaning beyond the words actually adopted by Congress. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Even if such appeals were appropriate in this context, the relevant principles are not those handpicked by Petitioner but, instead, the ones affirmatively "set forth in" the FSIA. 28 U.S.C. § 1602. To the extent Petitioner's "principles" are relevant, courts can rely on well-established doctrines, already used in the post-judgment discovery context, to address them. The FSIA, however, does not supply a trump card replacing this carefully crafted framework with one privileging foreign states that have refused voluntarily to comply with valid judgments of United States courts. If foreign states wish to obtain such special status, they should direct their arguments to Congress.

ARGUMENT

Stripped of its rhetoric, this case presents a simple and straightforward matter of statutory interpretation. The interpretive question is whether the FSIA independently limits post-judgment discovery in cases involving a foreign-state debtor over which a court has validly exercised jurisdiction. The answer is no.

This rule follows from faithful application of statutory interpretation techniques consistently applied by this Court in prior cases under the FSIA and other federal statutes: text, structure, legislative history and purpose. While Petitioner and its *amici* appeal to so-called principles that supposedly animate interpretation of the FSIA, that appeal should be rejected and, in any event, does not require this Court to twist the FSIA's meaning.

A. The FSIA's text does not limit post-judgment discovery against foreign state judgment debtors.

Like all questions of statutory interpretation, the proper construction of the FSIA begins with the text itself. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). *See also Amerada Hess*, 488 U.S. at 435 n.3. Tellingly, though, nothing in this "comprehensive set of legal standards" exempts foreign states from post-judgment discovery. Petitioner infers from this statutory silence a lack of express authorization to issue such discovery unless it pertains to specific assets that are subject to execution under the FSIA. (Br. at 33). Yet Congress had no need to authorize such discovery affirmatively in the FSIA. Courts already had the necessary authority from Rule 69(a)(2), which in 1976 and still today authorizes discovery "from any person – including the judgment debtor." Fed. R. Civ. P. 69(a)(2). Consequently, the better interpretation suggested by the statutory text

is that the ordinary rules governing post-judgment discovery apply even in cases where the judgment debtor is a foreign state.

B. The structure of the FSIA and other federal statutes confirms that Congress knows how to embed limits on discovery in positive law.

Lacking any support for its argument in the FSIA's text, Petitioner claims to unearth limits on post-judgment discovery in other features of the statute. (Br. at 27). *Amici* agree that the FSIA's structure bears on its interpretation. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 357-58 (1993); *Amerada Hess*, 488 U.S. at 434. But a close examination of that structure does not support Petitioner's argument. Rather, it confirms that the FSIA does not independently limit post-judgment discovery ordinarily available under Rule 69(a)(2).

"Drawing meaning from silence is particularly inappropriate . . . [where] Congress has shown that it knows how to [address an issue] in express terms." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). Other provisions of the statute illustrate that Congress "knows how to" address discovery limits "in express terms." Specifically, Section 1605(g), entitled "Limitation on Discovery," contains no mention of post-judgment discovery.[2] *See Almendarez-Torres v.*

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[2] Both the Seventh Circuit in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 n.10 (7th Cir. 2011), and the United States in its brief to this Court, Br. of the United States at 15 n.7,

United States, 523 U.S. 224, 234 (1998) (including "the heading of a section" among the "'tools available for the resolution of a doubt' about the meaning of a statute" (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947))). Instead, this limitation applies only where: (a) the case arises exclusively under the FSIA's antiterrorism exception, 28 U.S.C. § 1605A; (b) the discovery is directed at the United States; and (c) the Attorney General certifies that the discovery "would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action." 28 U.S.C. 1605(g)(1)(A).

This limitation reveals Congress's intent in several respects. First, and most obviously, the need to enact a specific limitation on discovery presupposes that normal discovery is otherwise available. Second, when Congress does intend to limit discovery, it ties the limitation to a specific exception to immunity. Third, in such statutes, Congress also specifies the party (including the sovereign) that may invoke the limitation. Section 1605(g) allows no exception in cases where the court's jurisdiction is based on something other than the antiterrorism exception and grants no exception to parties other than the United States. In short, Congress knows how to embed discovery limits in federal statutes and, had it intended to create special rules limiting post-judgment discovery in cases involving foreign-state debtors, it would have done so.[3]

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acknowledge the existence of this provision but fail to discuss its implications.

[3] The United States Code is replete with examples, like Section 1605(g), where Congress has embedded specific limits on discovery in federal law. *See, e.g.*, 10 U.S.C. § 949p-4(a)(1) (limiting

Other features of the FSIA demonstrate that Congress "knows how to" carve out exceptions to ordinary practice under the Federal Rules of Civil Procedure in cases involving foreign states. As this Court recently and repeatedly has recognized, the FSIA contains special provisions governing personal jurisdiction and service of process that differ from those applying to ordinary defendants. *See Samantar v. Yousuf*, 560 U.S. 305, 324 n.20 (2010); *Verlinden*, 461 U.S. at 485 n.5.

- The personal jurisdiction provisions automatically authorize the exercise of personal jurisdiction over the foreign state if an exception to immunity applies. *See* 28 U.S.C. § 1330. Otherwise, in a garden-variety breach of contract claim against a non-sovereign defendant, the federal court would have to borrow the long-arm statute of the state in which it sits in order to test whether personal jurisdiction is authorized. *See* Fed. R. Civ. P. 4(k)(1)(a).
- The service of process provisions similarly set forth detailed requirements governing service of process against foreign states and their

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access by accused to classified information in proceedings before military commissions); 15 U.S.C. § 37(b) (providing partial immunity from federal and state antitrust laws for charitable gift annuities and charitable remainder trusts and, including among the immunities, "the right not to bear the cost, burden, and risk of discovery"); 15 U.S.C. § 2055(e)(2) (providing that certain reports supplied by manufacturers to the Consumer Product Safety Commission shall be "immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding" except in certain enumerated cases); 18 U.S.C. § 2336(b) (limiting access to Justice Department files in civil claims for acts of terrorism).

> agencies or instrumentalities. *See* 28 U.S.C. § 1608; Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608."). Otherwise, in a garden-variety case, a foreign defendant is served by the means set forth in Federal Rule of Civil Procedure 4(f) and 4(h)(2).

In light of the express alterations to ordinary civil practice contained elsewhere in the FSIA, the better inference from the FSIA's structure is that Congress did not intend to alter the application of Rule 69(a)(2) in cases where the judgment debtor happens to be a foreign state.

Relying heavily on the Seventh Circuit's decision in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), Petitioner argues (Br. at 36-39) that the FSIA's provisions immunizing certain foreign-state property from execution, 28 U.S.C. §§ 1609-11, correspondingly limit discovery to specific requests about property subject to execution in the United States. Just like Petitioner's flawed textual argument, *see supra* at 5-6, this argument improperly conflates a court's power to order post-judgment discovery with its power to issue a writ of execution.

While the FSIA limits the property of a foreign state in the United States subject to a writ of execution, that limitation does not "vest in [the foreign state] a 'right' not to pay a valid judgment against it." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992). Questions of post-judgment discovery arise only if the judgment debtor does not voluntarily comply with the court's judgment. *See Senate Judiciary Committee Report*, at 9. In those cases, courts must exercise their "inherent power to

enforce [their] judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Riggs v. Johnson Cnty.*, 73 U.S. (6 Wall.) 166, 187 (1868). This "inherent power" includes the power to issue process until the judgment is satisfied. Such process "is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs*, 73 U.S. at 187. *See also Cent. Nat'l Bank v. Stevens*, 169 U.S. 432, 464 (1898) ("[J]urisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied.").

The broad post-judgment discovery authorized by Rule 69 merely represents a particular species of this "inherent power." It enables courts to identify property of the judgment debtor that may be subject to execution, whether in the United States or abroad. *See* Pet. App. 26. Indeed, precisely because of the limits contained in the FSIA, judgment creditors may need to seek execution against property located in countries with more generous execution provisions than the United States, *see* Pet. App. 27-28, and post-judgment discovery enables them "to determine which courts those are." *Richmark*, 959 F.2d at 1478; *see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 376, 380 (D.C. Cir. 2011) (Silberman, J.) (affirming court's power to issue contempt sanction against foreign state for failure to provide discovery about assets located in other countries where judgment creditor might seek to execute on judgment of United States court); *cf. Republic of Austria v. Altmann*, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) ("Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims . . . but not

respondent's right to seek redress elsewhere."). Post-judgment discovery also allows courts to determine the "situs" of assets, particularly intangible ones, so that parties can determine where to pursue execution. *See* Pet. App. 31. Finally, post-judgment discovery can help courts determine whether *alter egos* of the judgment debtor have property in the United States that can be used to satisfy the judgment. *See, e.g.*, *First City, Texas-Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630-33 (1983) (recognizing the *alter ego* principle in cases involving state-owned entities).

In sum, the better reading of the FSIA's structure is that Congress did not intend to confine Rule 69 to discovery about specific assets of the foreign state subject to execution in the United States.

C. The FSIA's legislative history demonstrates that Congress did not wish to alter ordinary discovery principles in cases involving foreign states.

Amici recognize the members of this Court do not all accord the same weight to the legislative history of a statute. *Compare Samantar*, 560 U.S. at 316 n.9, *with id.* at 326 (Alito, J. concurring); *id.* at 326 (Thomas, J., concurring in part and concurring in the judgment), *and id.* at 326-28 (Scalia, J., concurring in the judgment). For those Justices who do consult legislative history, that history points in the same direction as the plain text and the statutory structure: the FSIA does not impose independent limits on post-judgment discovery under Rule 69(a)(2).

Both the House and Senate committee reports on the FSIA "demonstrate[] that Congress kept in place

a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs.*, 637 F.3d at 378 (Silberman, J.). Both reports contain identical language stating that "[t]he bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area." *House Judiciary Committee Report*, at 23; *Senate Judiciary Committee Report*, at 22.

Congress's express satisfaction with the "existing law" of discovery is significant. In 1970, a mere six years prior to the FSIA's enactment (and a mere three years before Congress first held hearings on the proposed legislation), Rule 69(a)(2) was amended to ensure that judgment creditors could utilize the full array of discovery tools when seeking to obtain information from a judgment debtor. *See* Fed. R. Civ. P. 69 advisory committee's note (1970); *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *1973 House Hearing*]. In light of those recent amendments, had Congress intended to create special rules for post-judgment discovery against foreign states, it would have so provided in the bill.[4]

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[4] Practice prior to the FSIA's enactment confirms that discovery was available against foreign states in cases where jurisdiction was proper. Even prior to 1952, foreign states were not entirely immune from suit. Most obviously, the State Department might decline to file a suggestion of immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945). But far earlier, only a few years after its decision in *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), this Court recognized that foreign states surrendered their immunity when they voluntarily appeared in prize cases laying claim to the disputed cargo. *See The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353-54 (1822); *see also Amerada Hess*, 488 U.S. at 437 (citing *Santissima*

Other aspects of the legislative history likewise suggest that Congress did not intend to create different discovery rules for cases involving foreign-state defendants. Both the House and Senate committee reports state that "appropriate remedies would be available under Rule 37, F. R. Civ. P., for an unjustifiable failure to make discovery." *House Judiciary Committee Report*, at 23; *Senate Judiciary Committee Report*, at 22. Nothing in either report indicates that courts should alter their application of Rule 37

Trinidad for the proposition that "foreign states were not immune from the jurisdiction of United States courts in prize proceedings"). Likewise, immunity was denied if the state merely claimed title, but not possession, of the property in dispute. *See The Navemar*, 303 U.S. 68 (1938). In other cases, foreign states might proceed as plaintiffs and be amenable to counterclaims or setoffs. *See Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 359-65 (1955).

In cases like these, where the foreign state was not immune, it was obligated to provide discovery. *See Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 134 n.2 (1938) ("The foreign sovereign suing as a plaintiff must give discovery."); *The Gloria*, 286 F. 188, 194 (S.D.N.Y. 1923) ("[W]here a foreign sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defense to the proceeding, which the foreign sovereign has himself adopted.") (quoting *Duke of Brunswick v. King of Hanover*, [1844] 6 Beavan 1, 37, 38); *see generally* Charles H. Weston, *Actions Against the Property of Sovereigns*, 32 Harv. L. Rev. 266, 275 (1919) ("When a sovereign comes into court as plaintiff . . . he is bound by the usual rules governing litigants. He may be required to give security for costs and he may be met by defenses, set-offs or cross-bills . . . ."); *International Law—Sovereign State as Plaintiff—Waiver of Immunity from Interpleader of Third Person by Defendant*, 27 Yale L. J. 278, 279 (1917) ("[I]f a sovereign power commences proceedings, it must conform to the practice and regulations of the court, such as giving discovery, etc.").

standards in light of the fact that the sovereign might be the party subject to a discovery sanction. Again, had Congress believed it was necessary to treat foreign states with kid gloves, it would have so provided in the FSIA and not left the matter subject to the ordinary practice under the Federal Rules of Civil Procedure.[5]

Petitioner argues that the above-cited passages from the House and Senate reports are better understood to refer only to discovery during the liability phase of a case and not to post-judgment discovery pursuant to Rule 69(a)(2). (Br. at 51). This interpretation is incorrect. Nothing in the reports suggests that Congress intended to leave merits discovery alone while restricting post-judgment discovery. Both reports refer to "discovery" generally when describing the committees' parallel views about the adequacy of "existing law." Petitioner attempts to draw support for its interpretation from the fact that the passage on discovery appears in a portion of the reports entitled "extent of liability." (Br. at 51). But post-judgment discovery uses the exact same tools as those used in the liability phase of a case. *See* Fed. R. Civ. P. 69 advisory committee's note (1970). Since Congress found "existing law" regarding those devices to be adequate, "it would be surprising, indeed, if Congress had" limited those devices "*sub silentio*" for post-judgment discovery while leaving them unchanged for merits discovery. *Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001). *Cf. Dames &*

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[5] Likewise, both committee reports are replete with indications that Congress expected suits against foreign states under the FSIA to operate in harmony with the Federal Rules of Civil Procedure (except where Congress specifically provided otherwise). *See, e.g., Senate Judiciary Committee Report*, at 8, 22-25, 32; *House Judiciary Committee Report*, at 23-25, 32.

Moore v. Regan, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA.").

Petitioner claims to find further support for its interpretation of the legislative history in the section of the House report addressing immunity from attachment. (Br. at 52). That section states that Section 1610's reference to "'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State Law to obtain satisfaction of a judgment." *House Judiciary Committee Report*, at 28 (citing Fed. R. Civ. P. 69).

This passage cannot sustain the weight that Petitioner attempts to give it. The very next passage of this report sheds light on the meaning of the term "supplemental proceedings." It refers not to discovery proceedings but, instead, to the proceedings where attachment, execution or some other form of legal claim would be asserted against the judgment debtor's property. *Id.* This understanding of the term "supplemental proceedings" accords with the meaning given to it by this Court. *See Peacock*, 516 U.S. at 356-57 ("[W]e have approved the exercise of ancillary jurisdiction over a broad range of *supplementary proceedings* involving third parties to assist in the protection and enforcement of federal judgments—including *attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances.*") (citations omitted and emphasis added). Thus, contrary to Petitioner's argument, the reference to "supplemental proceedings" and Rule 69 in the

House Judiciary Committee Report does not demonstrate that Congress intended for the FSIA's execution provisions to impose limits on post-judgment discovery.

D. Interpreting the FSIA not to limit post-judgment discovery comports with one of the statute's core purposes: to provide a meaningful remedy to plaintiffs, including holders of foreign-sovereign debt.

When interpreting the FSIA, this Court has also considered the purposes behind the statute. *See Samantar*, 560 U.S. at 319-20, 325; *Permanent Mission of India*, 551 U.S. at 199, 202. Those purposes likewise support the view suggested by the text, structure and legislative history: that the FSIA does not erect an independent limit on post-judgment discovery in cases where the judgment debtor is a foreign state.

A primary purpose of the FSIA was to ensure that private parties could obtain meaningful recovery from foreign states operating in their commercial capacity. "Congress intended that one should generally be able to execute any judgments one could obtain." Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* § 12.1, at 744 (2d ed. 2003) (footnote omitted). The FSIA makes this purpose apparent when it declares that judicial determinations of foreign sovereign immunity would protect not only the rights of foreign states but also those of "litigants in United States courts." 28 U.S.C. § 1602. This Court likewise repeatedly has recognized this purpose, including in cases brought by foreign plaintiffs against foreign states. *Verlinden*, 461 U.S. at 489-91. The Executive Branch repeatedly acknowledged this purpose during hearings on the draft legislation. For

example, the State Department's Legal Advisor discussed this goal when testifying in favor of the bill shortly before its enactment:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause.
>
> The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 27 (1976) (statement of Monroe Leigh, Legal Advisor, Department of State) [hereinafter *1976 House Hearing*]; *see also id.* at 24 ("[T]he general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would."). The Justice Department's head of the Foreign Litigation Section testified to the same effect. *See id.* at 31 (statement of Bruno A. Ristau, Chief, Foreign Litigation Section of the Department of Justice) ("[P]rivate parties with claims against foreign states arising out of their commercial or private-law activities should not be denied their day in court by outmoded notions of absolute immunity which arose in the era of personal sovereigns.").

This goal of protecting the rights of litigants extends to holders of foreign-sovereign debt. Early drafts of

the FSIA retained immunity for foreign states from suits on debt obligations for general governmental purposes unless the state waived immunity (or the debt belonged to a political subdivision or agency or instrumentality of the foreign state). *See 1973 House Hearing*, at 36 (draft of bill); *1976 House Hearing*, at 10-11 (same). While animated by a concern that actions based on such debt might interfere with the development of capital markets in the United States, *see 1973 House Hearing*, at 22 (statement of Hon. Charles N. Brower, Legal Advisor, Department of State), the provision was criticized on the ground that it could "prevent plaintiffs from bringing suit with respect to a foreign state's guarantee of a debt obligation." *1976 House Hearing*, at 69 (written statement of the International Law and Transactions Division of the District of Columbia Bar). Moreover, the House and Senate Judiciary Committees noted that many sovereign debt obligations contained broad waivers of immunity and that, in all events, bond sales "should be treated like other similar commercial transactions." *See House Judiciary Committee Report*, at 10; *Senate Judiciary Committee Report*, at 6-7; *see also Weltover*, 504 U.S. at 615 ("[W]e perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states."). Consequently, both committees removed the public debt provision following legislative hearings in the summer of 1976 and prior to adoption of the committee reports. Thus, the FSIA was designed to ensure that holders of foreign-sovereign debt were among those litigants whose "rights" it would protect.

Artificially limiting post-judgment discovery thwarts this purpose. Most of the exceptions to the immunity from execution contained in Section 1610(a) would not

apply to execution on a judgment based on a foreign-sovereign debt obligation. *See* 28 U.S.C. § 1610(a)(3)-(7). Unless the waiver exception is broadly interpreted, *see* Resp's Br. at 54-56, judgment creditors are left to rely on the exception for property used for a commercial activity. *See* 28 U.S.C. § 1610(a)(2). Yet, unlike real property or much personal property, public debt is intangible and liquid. Absent broad discovery, it would be exceedingly difficult for holders of sovereign debt to determine whether the property is "in the United States" or was "used for the commercial activity on which the claim is based." Moreover, post-judgment discovery also enables the judgment creditor to identify property located in other countries, where execution may be easier. *See supra* at 10-11. Thus, broad post-judgment discovery advances the FSIA's goal of ensuring that foreign states do not shift the "burdens of the marketplace onto the shoulders of private parties."

E. Petitioner's appeal to the FSIA's "principles" should be rejected and, in any event, can be addressed by other doctrines developed in ordinary discovery disputes.

Bereft of any support in the text, structure, legislative history or purposes of the FSIA, Petitioner falls back on various principles to support its interpretation of the statute. This appeal to extra-statutory principles should be rejected. First, it is inconsistent with the FSIA's design. Second, even if such an appeal were appropriate, Petitioner's principles do not support its argument. Third, in all events, other doctrines adequately address the underlying concerns.

1. Petitioner's appeal to extra-statutory principles is inconsistent with the FSIA.

Generalized appeals to principles are inappropriate in cases arising under the FSIA. As this Court previously has recognized, "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618. Consequently, such appeals create a significant risk of according to the FSIA a meaning other than what Congress adopted. Congress recognized as much. It did not license an all-encompassing appeal to principles. Rather, the FSIA simply provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles *set forth in this chapter.*" 28 U.S.C. § 1602 (emphasis added). The FSIA does not affirmatively "set forth" any of the three principles identified by Petitioner, so this Court should not consider them.

2. Petitioner's principles do not support its rule.

Even if Petitioner's appeal were appropriate (and it is not), the three principles identified by Petitioner do not support the rule that it seeks. In some cases, this Court has rejected the argument; in others, existing discovery doctrines already address the concerns underlying Petitioner's principles. Consequently, there is no need to twist the FSIA's meaning.

Comity: Petitioner first invokes the principle of comity. (Br. at 41-44). Comity has many meanings, and this Court has referred to it in a variety of contexts: where federal law leaves a subject wholly unaddressed, such as the enforcement of foreign

judgments, *see Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), or where questions have arisen about the extent to which Congress has exercised its prescriptive jurisdiction, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting). In this case, however, Congress already has shown the degree of comity that it wishes to extend to foreign states by demarcating the boundaries of their immunity in the FSIA. It did not, however, exempt foreign states *already subject to jurisdiction* in United States courts from discovery that is otherwise authorized under the Federal Rules of Civil Procedure. *See 1976 House Hearing*, at 30 (statement of Bruno A. Ristau, Chief, Foreign Litigation Section of Department of Justice) ("[T]he adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.").

Even if resort to comity might be appropriate, Petitioner is wrong to rely on the views of the Executive Branch. Petitioner observes that the United States Government has filed at least seven briefs *amicus curiae* since 2007 in which it has presented its view regarding the relationship between post-judgment discovery and the FSIA's provisions on immunity against execution. (Br. at 42). But the Executive Branch's views on the proper construction of the FSIA (much less Rule 69) "merit no special deference." *Altmann*, 541 U.S. at 701. Much like *Altmann*, this case raises a "pure question of statutory construction . . . well within the province of the

Judiciary." *Id.* (quoting *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446, 448 (1987)).

Petitioner's appeal to the Executive Branch's proposed interpretation of the FSIA under the guise of comity not only is inconsistent with this Court's prior decisions, it also flies in the face of the FSIA. It would effectively revert to a system of politically-tinged immunity determinations, contrary to a principle that *was* expressly "set forth" in the FSIA and contrary to the Executive Branch's own position. *See* 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."); *1973 House Hearing*, at 14 (statement of Hon. Charles N. Brower, Legal Advisor, Department of State) ("We at the Department of State are now persuaded—and may I say we have been for some time—that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.").

Even assuming that nonstatutory considerations of comity still play some residual role in construing the FSIA, the authorities relied upon by Petitioner do not support its argument. In particular, Petitioner misinterprets this Court's prior decision in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987). *Aérospatiale* involved the question of whether a party seeking discovery of information located abroad was required to make "first resort" to the Hague Convention on the Taking of Evidence Abroad in Civil or

Commercial Matters. Tellingly, the defendants in *Aérospatiale* were state-owned entities, one of which was directly owned by the French Government and, thus, would have qualified as an agency or instrumentality. 482 U.S. at 525 n.2. Nowhere did the Court question that it had the power to issue direct discovery orders against such entities. *See id.* at 542. *See also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958); Restatement (Third) of the Foreign Relations Law § 442 (1987). While the Court held that comity principles should guide whether to require resort to the Convention (in lieu of a direct discovery order), nothing in its description of the "concerns that guide a comity analysis" turns on whether the object of the discovery is a foreign state or state-owned entity. *Aérospatiale*, 482 U.S. at 544 n.28.[6] On the contrary, the Court observed that "[i]t would be particularly incongruous to recognize such a preference" against direct discovery orders issued against sovereign-owned entities. *Id.* at 544 n.29.

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[6] Elsewhere in *Aérospatiale*, the Court remarked that "we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." 482 U.S. at 546. The only decision cited in connection with this statement is *Hilton*, 159 U.S. 113, where this Court *refused* to recognize a French court's money judgment. Thus, this sentence is best understood simply as a reminder that United States courts consider the interests expressed by foreign states (whether parties or not) when crafting discovery orders requiring the disclosure of information located abroad—something that courts already do. *See infra* at 28. *Aérospatiale* does not support the very different proposition advanced by Petitioner, namely that a foreign state, by virtue of its status, is subject to a different set of discovery rules or that the foreign state's status trumps consideration of the competing values that might justify a particular discovery order.

In short, at least in cases where a court's jurisdiction is established, comity principles do not entitle foreign states to a special immunity from discovery orders.

Burdens of Litigation: Relying on the Seventh Circuit's decision in *Rubin*, Petitioner next invokes the principle that sovereign immunity is designed partly to spare foreign-state defendants the burdens of litigation. (Br. at 44-48). *See also Rubin*, 637 F.3d at 795. It analogizes this case to cases of jurisdictional discovery against foreign states and claims of official immunity by domestic governmental officers.

Petitioner's reliance on this principle is inapt. Cases of jurisdictional discovery against foreign states involve instances where the court's jurisdiction over the defendant is contested. For example, if a sovereign's conduct does not fall within one of the exceptions contained in Section 1605, then the United States court lacks subject-matter jurisdiction over the suit and personal jurisdiction over the defendant. *See* 28 U.S.C. §§ 1330, 1604. In these circumstances, discovery imposes a potential burden on the defendant that would be inconsistent with the grant of immunity. (Of course, on the other hand, if discovery reveals that the defendant was *not* entitled to the claimed immunity, then the burden may be entirely justified). Since parties generally bear their own costs under the American rule, even when they prevail, the compliance costs associated with jurisdictional discovery may well be unrecoverable.

Post-judgment discovery stands on a different footing. In these situations, the court has established subject-matter and personal jurisdiction over the defendant. Consequently, the foreign state suffers no unfair burden by having to respond to post-judgment discovery. *See Rafidain Bank*, 150 F.3d at 177. While

certain property may be immune from discovery, the foreign state's "property" does not suffer from some unrecoverable burden by virtue of a disclosure about it. Thus, whatever rules properly govern the availability of jurisdictional discovery over a foreign state, they have no bearing on the entirely different question of post-judgment discovery against a foreign state properly subject to the court's jurisdiction.

Doctrines of official immunity are similarly unhelpful to Petitioner's cause. As this Court previously recognized in *Dole Food*, official immunity doctrines supply a poor analogy to any argument about the sweep of foreign sovereign immunity. For one thing, cases involving the official immunity of government actors (in contrast to cases involving foreign sovereign immunity) "do not involve the interpretation of a statute." 538 U.S. at 479. For another thing, official immunity doctrines are designed to "prevent the threat of suit from crippling the proper and effective administration of public affairs." *Id.* (citation and internal quotations omitted). By contrast, foreign sovereign immunity "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give [them] some protection from the inconvenience of a suit as a gesture of comity between the United States and other sovereigns." *Id.* In cases like this one, the need for that "gesture" drops out once a court concludes that the foreign state's conduct falls under one of the exceptions to immunity set forth in Section 1605 of the FSIA. At that point, any "inconvenience" suffered by the foreign state is justified by the need for it to be held accountable for its conduct, just like any other private party.

Protecting the Reciprocal Interest of the United States: Petitioner finally invokes the principle that the FSIA should be construed so as to protect the reciprocal interests of the United States. (Br. at 48-50). Nothing in the FSIA "set[s] forth" this principle. Nor can Petitioner point to any decision of this Court relying on this supposed principle to inform its interpretation of the FSIA.

Indeed, in a related context, this Court has cautioned against allowing consideration of the reciprocal interests of the United States to influence its interpretation of federal law. In *Banco Nacional de Cuba v. Sabbatino*, this Court observed that considerations of reciprocity generally have been limited to the foreign judgment enforcement context and declined to give the principle broader application to decide whether a foreign state had standing to sue. 376 U.S. 398, 411-12 (1964). In so holding, the Court explained that the political branches could employ "a variety of techniques" to ensure that the reciprocal interests of the United States are protected. *Id.* at 412. The reasons underpinning the holding in *Sabbatino*, which involved federal common law doctrines, apply with even greater force in this context, where the political branches have expressly spoken, through the FSIA, and did not tie the statute's sweep to the reciprocal treatment of the United States in foreign court.[7]

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[7] Even if it were appropriate to consider the reciprocal interests of the United States in cases under the FSIA, alternative doctrines already adequately address those interests. As this Court has recently recognized, the Executive Branch can suggest that a court defer to its views on the foreign relations implications of exercising its subject-matter jurisdiction. *See Altmann*, 541 U.S. at 701-02; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21

3. Whatever residual value Petitioner's principles have, existing doctrines adequately address them.

To the extent Petitioner's three principles are valid, existing doctrines can address the underlying concerns and do not require special or novel rules of civil procedure for sovereign entities. For one thing, foreign states (or third-parties) can object to post-judgment discovery on the grounds available to any other judgment debtor. These might include, among others, grounds of relevance or burdensomeness. *See* Fed. R. Civ. P. 26(b)(2)(C). For another thing, foreign states can invoke privileges that might justify nondisclosure of the information. *See* Fed. R. Civ. P. 26(b)(5); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1278-83 (7th Cir. 1990) (considering privilege claim in post-judgment discovery). If post-judgment discovery required disclosure of information located abroad and foreign law precluded the disclosure, a court can weigh (as the district court already has done in this case) various interests, including the interests of the foreign state, in deciding whether to compel disclosure.[8] *See generally* Restatement (Third) of the

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(2004). Those implications include the risk that a particular exercise of jurisdiction might expose the United States to reciprocal treatment in a foreign forum. Tellingly, though, the United States did not make such a request in this case while the merits of the suit were pending. Nor has it done so in its brief to this Court. Any such request for case-specific deference would be especially unconvincing in this case in light of Argentina's unambiguous waiver of its immunity in the bond documents.

[8] Courts routinely have applied the Section 442 framework to resolve conflicts between their discovery orders and the laws of foreign states that purport to block the disclosure. *See generally* Gary B. Born & Peter B. Rutledge, *International Civil Litigation*

Foreign Relations Law § 442 (1987); *see also Reinsurance Co.*, 902 F.2d at 1278-83 (applying the Restatement § 442 test in the context of post-judgment discovery); Resp's Br. at 15 n.1 (citing docket entry where district court balanced applicable factors to decide whether to order disclosure of information located abroad where foreign law allegedly precluded it).

F. The Second Circuit properly held that the FSIA did not preclude post-judgment discovery in this case.

Under the principle articulated in this brief, the Second Circuit properly upheld the district court's order enforcing the subpoenas against the third-party banks. In light of Argentina's refusal to comply voluntarily with the judgments against it, the subpoenas represented a proper exercise of the district court's authority under Rule 69 to order discovery "in aid of" those judgments. The district court properly considered objections such as burdensomeness before enforcing the subpoenas.

The only issue before the Second Circuit (and the only issue before this Court) was Argentina's argument that the FSIA independently barred the subpoenas. The Second Circuit correctly rejected that argument: the FSIA does not provide a separate basis upon which a foreign state may object to post-judgment discovery. Because the FSIA does not bar post-judgment discovery against Argentina itself, it likewise does not supply an independent basis for

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in United States Courts 1019-20 (5th ed. 2011) (collecting cases); *cf. Aérospatiale*, 482 U.S. at 544 n.28 (adverting to the Section 442 standards, in their draft form, to guide a court's analysis whether to require resort to the Hague Evidence Convention).

objection to the subpoenas against the third-party banks.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix: List of *Amici* Law Professors

(Affiliations appear for identification purposes only.)

Julian Ku is a Professor of Law at Hofstra University where he is also the Faculty Director of International Programs. He teaches transnational law, constitutional law and foreign affairs law and has written widely on these subjects.

Jeremy A. Rabkin is a Professor of law at George Mason University Law School and previously a Professor of Government at Cornell University. He teaches constitutional, administrative, and international law and has written widely on these subjects.

John C. Yoo is the Heller Professor of Law at the University of California at Berkeley and a Visiting Scholar at the American Enterprise Institute. He teaches constitutional law, international civil litigation and foreign relations law and has written a number of books on the Constitution and foreign affairs.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MONTREUX PARTNERS, L.P., CORDOBA CAPITAL, LOS ANGELES CAPITAL, AND WILTON CAPITAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Montreux Partners, L.P., Cordoba Capital, Los Angeles Capital, and Wilton Capital are investors in sovereign debt. Each of these *amici* has obtained one or more final judgments entered by the United States District Court for the Southern District of New York against Petitioner the Republic of Argentina ("Argentina" or the "Republic") based on Argentina's non-payment of its dollar-denominated external sovereign debt.[2] Those judgments remain entirely unpaid. Each of these *amici* has sought post-judgment discovery under the Federal Rules of Civil Procedure concerning assets of the Republic that are located or may be located outside the United States. More generally, each of these *amici*, as an investor in sovereign debt that is governed by New York law and that may be enforced through litigation in the Southern District of New York, has an interest in a system of discovery that confers on federal district courts the power and discretion to assist creditors of a defaulting sovereign debtor in identifying assets of the debtor that may be located outside the United States.

SUMMARY OF ARGUMENT

In support of their argument that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602–1611, curtails post-judgment discovery

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] *See Montreux Partners, L.P. v. Republic of Arg.*, No. 05 Civ. 4239 (TPG), 2009 WL 1528535, at *1–2 (S.D.N.Y. May 29, 2009) (opinion directing entry of judgments), *aff'd*, 435 F. App'x 41 (2d Cir. Aug. 17, 2011).

against private entities concerning the property of a foreign sovereign judgment debtor, petitioner Argentina and *amicus* the United States speculate that the discovery orders in this case might thwart comity, might harm U.S. foreign relations, and might result in reciprocal adverse treatment for the United States. *See* Pet. Br. 39–50; U.S. Br. 18–22, 32–33. These hypothetical concerns are irrelevant to the proper interpretation of the FSIA, which sought to ensure that courts make immunity determinations on the basis of written law. *See* Resp. Br. 33–39. But even if the concerns were relevant to the interpretation of the FSIA or otherwise of interest to this Court, they are, as *amici* will show, legally and factually unsupported and highly unlikely to materialize.

First, the discovery orders are consistent with international norms concerning State immunity, and thus raise no comity concerns or danger of legitimate retaliatory action related to immunity. Argentina and the United States agree that the best measure of accepted international norms in this context is the United Nations Convention on Jurisdictional Immunities. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("Convention on Jurisdictional Immunities" or "Convention"). The Convention confers immunity only on "post-judgment measures of *constraint*, such as attachment or arrest, against property of a [foreign] State." *Id.*, Art. 19 (emphasis added). Since discovery orders for information about sovereign property in no way constrain the use of that property, they do not implicate State immunity from execution. Article 24(1) of the Convention confirms this conclusion. It expressly permits a national court to order a foreign State party "to produce any

document or disclose any other information for the purposes of a proceeding." The discovery orders are also consistent with international norms of State immunity for the independent reason that Argentina broadly waived its immunity from post-judgment execution.

Second, the United States' speculative concerns about disadvantageous reciprocal treatment have little basis in international or foreign law, and are highly unlikely to materialize. The United States can hardly complain about a reciprocal practice that is consistent with pertinent international norms. But in any event, the likelihood of adverse reciprocal treatment in foreign courts is improbable for the simple reason that foreign discovery practices are significantly more restrained than discovery practices in U.S. courts. Adverse reciprocal treatment is all the more unlikely because foreign courts rarely limit State immunity on this basis. Even the nations with statutes that make reciprocity a potential criterion will deny sovereign immunity based on lack of reciprocity only if the executive branch of the forum nation so requests, and only if the United States does not accord sovereign immunity to that nation in particular. These conditions are very rarely satisfied. And the absence of any pressing threat of adverse reciprocal treatment is confirmed by the failure of even a single foreign sovereign to file an *amicus* brief in support of Argentina.

ARGUMENT

Argentina and the United States maintain that post-judgment discovery against private entities concerning the property of a foreign sovereign judgment debtor will cause significant foreign relations controversy and invite disadvantageous reciprocal treatment for the United States. These claims are speculative and abstract. They also lack factual or legal foundation, and deserve no credit.

I. The Discovery Orders Are Consistent with International Norms of State Immunity and Thus Do Not Implicate Any Legitimate Comity Concerns

Comity in the discovery context "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.27 (1987). The avowed concerns about comity in this case, and the related concerns about potential foreign relations harm, presuppose that the discovery orders do not account for sovereign interests. But this presupposition is false because the discovery orders conform to international norms of State immunity.

A. The Discovery Orders Are Consistent with International Norms of State Immunity Because They Are Not "Measures of Constraint" on the Use of State Property

Nations take different approaches to the details of State immunity against execution, and no globally binding treaty governs their actions in this context. *See* Xiaodong Yang, *State Immunity in International*

Law ch. 9 (2012) (canvassing state practice). The best guide to accepted international norms within the variety of State practice is the Convention on Jurisdictional Immunities. The Convention has not been ratified by the United States and thus can have no impact on the proper interpretation of the FSIA. But importantly, both the United States and Argentina acknowledge that it is the proper measure of accepted international norms in this context. *See* U.S. Br. 28 n.12; Pet. Br. 43 & n.20.

Article 19 of the Convention governs State immunity from post-judgment execution. Like Section 1609 of the FSIA, Article 19 describes this immunity in precise and limited terms. Article 19 provides, subject to identified exceptions, that "[n]o post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State . . . ." Convention on Jurisdictional Immunities, Art. 19; *see also Report of the International Law Commission on the Work of its Forty-Third Session* at 55, U.N. Doc. A/46/10 (Supp.) (Sept. 1, 1991) (explaining in official Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property that Part IV of Convention, which contains Article 19, "is concerned with State immunity from measures of constraint upon the use of property"). If a judicial measure does not "constrain" the use of State property, it does not implicate Article 19 and is thus consistent with international norms of State immunity from execution.

The discovery orders in this case in no way constrain the use of Argentina's property. As the Second Circuit properly noted, the orders "do[ ] not allow NML to at-

tach Argentina's property, or indeed have any legal effect on Argentina's property at all." *EM Ltd. v. Republic of Arg.*, 695 F.3d 201, 208 (2d Cir. 2012). Rather, they simply require two banks to provide information within their control about Argentina's assets. The orders are thus consistent with international norms of State immunity from execution.

Article 24(1) of the Convention confirms this conclusion. It contemplates that a national court can order a foreign State "to produce *any* document or disclose any other information for the purposes of a proceeding" without territorial qualification. Convention on Jurisdictional Immunities, Art. 24(1) (emphasis added). Article 24 limits this discovery power by disallowing certain consequences for State non-compliance, notably fines and penalties. *Id.*[3] But the critical point about Article 24(1) is that it "leaves unaffected the competence of courts to issue, in accordance with domestic law, orders enjoining foreign States" to produce any documents or information. *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* 363 (Roger O'Keefe & Christian Tams eds., 2013) ("*Convention Commentary*").

Article 24(1) has particular significance in this case because, as the government has stated, "it is the position of the United States that a number of the convention's provisions, including Article 24(1), reflect current international norms and practices regarding

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[3] Article 24 has not prevented some U.S. courts from interpreting the FSIA to permit monetary sanctions for non-compliance with court orders. *See FG Hemisphere Assocs., LLC* v. *Dem. Rep. Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744–45 (7th Cir. 2007).

foreign state immunity." Brief of the United States as *Amicus Curiae* in Support of Appellant at 22, *FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046). The government's current claim that the discovery orders will harm comity or spark foreign relations controversy thus rings hollow.

B. The Discovery Orders Are Also Consistent with International Norms of State Immunity Because Argentina Broadly Waived All Immunities from Execution

The discovery orders below do not violate international norms of State immunity for the independent reason that Argentina broadly waived all immunities from post-judgment execution. Waiver is an acknowledged exception to State immunity from execution under international law. *See* Convention on Jurisdictional Immunities, Art. 19(a) (prohibiting measures of constraint against State property "unless and except to the extent that . . . the State has expressly consented to the taking of such measures as indicated . . . in a written contract"). A waiver of immunity from post-judgment execution can extend to extraterritorial orders. *See, e.g.*, *Sabah Shipyard (Pak.) Ltd v. Pak.*, [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep. 571 (U.K.) (reading waiver of immunity to permit extraterritorial anti-suit injunction against state-owned Pakistan corporation).

The Argentine Fiscal Agency Agreement ("FAA") governing the bonds in this case provides:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity from . . . attachment prior to judgment, form [*sic*] attachment in

> aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

J.A. 106. This is an all-encompassing waiver of immunity from execution that distinguishes pre- and post-judgment judicial orders; waives immunity as to both under the laws of all potentially relevant jurisdictions; and expressly consents for purposes of the FSIA to "the giving of any relief or the issue of any process." The leading commentary on the Convention on Jurisdictional Immunities describes this very waiver as a "classic contractual provision in accordance with which a State patently consented to the taking of, *inter alia*, post-judgment measures of constraint against its property." *Convention Commentary*, at 320. *See also NML Capital Ltd v. Republic of Arg.*, [2011] UKSC 31 ¶¶ 128–29, [2011] 2 A.C. 495 (U.K.) (judgment of Lord Collins, joined by Lord Walker) (describing FAA waiver as it relates to enforcement of judgments as "clearest possible waiver of immunity").

The discovery orders in this case are on their face a "legal or judicial process" in aid of post-judgment execution for which Argentina waived immunity in the FAA. Even if the orders were somehow deemed measures of constraint against Argentina's use of its property, they would still fall within an acknowledged

exception to State immunity from post-judgment execution. The FAA waiver thus provides a second and independent reason why the discovery orders in this case respect comity and can give rise to no legally justifiable complaints abroad.[4]

II. The Discovery Orders Implicate No Realistic Reciprocity Concerns

The United States maintains that the discovery orders in this case "could lead to reciprocal adverse treatment of the United States in foreign courts." U.S. Br. 20. This worry, like the concerns about comity and foreign relations harm, is conspicuously abstract and speculative. It also has little foundation in international or foreign law, and is unlikely to be realized.

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[4] The FAA waiver has been litigated in other countries. *See, e.g.*, *NML Capital Ltd v. Republic of Arg.*, [2011] UKSC 31 ¶¶ 59–64, 83, 98, 127–30, 138, [2011] 2 A.C. 495 (U.K.) (ruling that FAA waiver permits enforcement of New York judgment in English courts); *Republic of Arg. v. High Court (Comm. Div.) Accra Ex Parte, Attorney General*, No. J5/10/2013 (Ghana S.C., June 20, 2013) (ruling that waiver was effective under international law to remove immunity from execution against Argentine warship but declining to respect the waiver as a matter of local law); *NML Capital, Ltd. v. Republic of Arg.*, Cour de Cassation [Cass.] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.) (ruling that waiver lacked adequate specificity to extend to attachment of diplomatic bank accounts); *Republic of Arg. v. NML Capital, Ltd.*, Cour de Cassation [Cass.] Nov. 22, 2012, No. C.11.0688.F/1 (Belg.) (similar). All of these decisions concerned the FAA waiver's relevance to attempted execution of judgments against Argentine property. By contrast, the case now before this Court concerns the relevance of the waiver to discovery against nonparties; it involves no attempted measure of constraint against Argentine property.

As noted above, the discovery orders in this case are consistent with Article 24(1) of the Convention on Jurisdictional Immunities that the United States itself says reflects accepted international norms. It is thus theoretically possible that a foreign court in a proper case could seek discovery from banks concerning U.S. property outside of the forum. But the United States can have no legitimate complaint about a discovery order in a foreign court that conforms to what the United States itself views as controlling international norms.

In any event, it is highly unlikely that the United States or a bank where it has accounts will ever in fact be subject to discovery orders like the ones issued below. One reason is that the United States is unlikely to find itself in a foreign court, having broadly waived immunity from jurisdiction and execution, in violation of valid legal obligations, defiantly resisting judicial efforts to enforce judgments based on those obligations. Another reason is that discovery in foreign courts is relatively constrained compared to discovery in U.S. courts. As the United States acknowledges, "because the scope of American discovery is often significantly broader than is permitted in other jurisdictions, respondent likely could not obtain such sweeping discovery in the courts of many other Nations." U.S. Pet'n Br. 15 (citation and internal quotation marks omitted); *see also* Rudolf Schlesinger, *Comparative Law* 762 (Ugo Mattei et al. eds., 7th ed. 2009) ("In most civil-law countries, discovery is almost nonexistent. Even in those countries in which it exists—a relatively new phenomenon—discovery is considerably more limited than in the U.S."). The nature and limits of foreign discovery law and practice make it implausible that the United States will be exposed to the type of discovery orders in this case.

Yet another reason why the United States is unlikely to suffer reciprocal disadvantage is that reciprocity is increasingly irrelevant to determinations about immunity from execution in foreign courts. *See* Yang, *supra* p. 5, at 57 (2012) (noting that "in practice, very few courts have expressly referred to [reciprocity] as the basis of immunity," and that "there are even statements dismissing it as having any bearing on the question of immunity"). Professors Fox and Webb conclude from an analysis of state practice and other sources that "[a]rguably, in the future the grant of immunity on terms of reciprocity or as a matter of discretion will constitute a breach of the forum State's obligation to afford immunity." Hazel Fox & Philippa Webb, *The Law of State Immunity* 14–15 (3d ed. 2013) (relying in part on *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment (Feb. 3, 2012), available at http://www.icjcij.org/-docket/files/143/16897.pdf). *Cf.* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 Am. J. Int'l L. 820, 855 (1981) (noting that approaches to State immunity from jurisdiction "based on reciprocity . . . lead to unsatisfactory subjectivity, and have attracted virtually no support").

It is true that some foreign statutes treat reciprocity as potentially relevant to execution immunity. *See, e.g.*, Foreign State Immunities Act 1985, § 42(1) (Austl.) ("Australia Act"); State Immunity Act, R.S.C. 1985, c. S-18, § 15 (Can.) ("Canada Act"); State Immunity Act, 1985, § 17 (Sing.) ("Singapore Act"); State Immunity Act, 1978, c. 33, § 15 (Gr. Brit.) ("United Kingdom Act"). But the discovery orders in this case pose no realistic reciprocal danger to the United States under these statutes. The statutes provide that reciprocity is relevant only when and to the extent that

the executive branch says so. *See* Australia Act § 42(1); Canada Act, § 15; Singapore Act § 17; United Kingdom Act § 15. And they limit the executive's discretion to modify immunity on a reciprocal basis to situations in which the reciprocal State (*e.g.*, the United States) has not accorded protection in relation to the foreign State on a reciprocal basis. *See* Australia Act § 42(1); Canada Act § 15; Singapore Act § 17; United Kingdom Act § 15. It is highly unlikely that discovery orders necessitated by Argentina's aggressive defiance of judicial process would be needed in the relatively rare lawsuits against these friendly nations and would result in such nations approving reciprocal action against the United States.

One imperfect but revealing measure of the likely reciprocal consequences of the discovery orders in this case is the number of foreign governments that have filed *amicus* briefs. Foreign governments closely monitor this Court's docket. In many cases with extraterritorial implications that pose concerns to foreign sovereign interests, several foreign governments filed *amicus* briefs to express their views. In *Société Nationale*, 482 U.S. 522, for example, four foreign governments filed *amicus* briefs to protest an extraterritorial discovery order on sovereignty grounds and to support petitioners' argument for the application of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.[5] Similarly, in *Kiobel v. Royal Dutch*

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[5] Brief for the Federal Republic of Germany as *Amicus Curiae* at 13, 32–33, 40–41, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Brief of *Amicus Curiae* the Republic of France in Support of Petitioners at 7–8, 14–15, *Société Nationale Industrielle Aérospatiale v. U.S.*

Petroleum Co., 133 S. Ct. 1659 (2013), four foreign governments and the European Union filed *amicus* briefs concerning the application of the Alien Tort Statute, 18 U.S.C. § 1350, to conduct abroad.[6] And in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), two foreign governments and a foreign state-owned corporation filed *amicus* briefs concerning the retroactive application of the FSIA.[7] By contrast, not a single foreign government has filed an *amicus* brief in support of Argentina in this case.

Dist. Court, 482 U.S. 522 (1987) (No. 85-1695); Brief of Government of Switzerland as *Amicus Curiae* in Support of Petitioners at 8, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioners at 7–8, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695).

[6] Brief for the Government of the Argentine Republic as *Amicus Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

[7] *Amicus Curiae* Brief in Support of Petitioner for the Government of the United Mexican States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13); Brief for *Amicus Curiae* Japan in Support of Petitioners, *Republic of Austria v. Altmann*,

Because foreign discovery is so limited, because reciprocity is rarely a basis for State immunity determinations, and because no foreign government other than Argentina has raised concerns about the discovery orders in this case, the United States faces no realistic threat of harmful reciprocal consequences. In any event, this Court's task is to interpret the FSIA, not to predict the foreign relations consequences of that interpretation. If concrete concerns about reciprocity ever materialize in this context, those concerns should be, as the United States Court of Appeals for the District of Columbia Circuit said in a similar context, "appropriately presented to Congress—not [the courts]." *FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011).

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541 U.S. 677 (2004) (No. 03-13); Brief for *Amicus Curiae*, Société Nationale des Chemins de fer Français in Support of Neither Party, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13).

CONCLUSION

The ruling below is unlikely to cause foreign relations harm or invite retaliatory action against the United States because it is consistent with pertinent international norms of State immunity and because foreign courts possess relatively modest discovery powers and rarely invoke reciprocity as a criterion for State immunity. The Court can safely focus its attention on the text and structure of the FSIA without worrying about these foreign relations concerns.

Respectfully submitted,

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REPUBLIC OF ARGENTINA,
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v.
NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 12-842

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

The National Association of Manufacturers respectfully submits this brief as *amicus curiae*.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manu-

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

facturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM regularly files amicus briefs in cases of importance to the manufacturing community. *See, e.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). Because American manufacturers frequently do business with foreign sovereign entities, and invest substantial sums in those business ventures, NAM has a unique perspective on the critical importance of contract enforcement in FSIA cases.

SUMMARY OF ARGUMENT

This is not the first time a foreign sovereign entity has demanded that the Court impose a categorical constraint on the discovery process for the sake of "comity." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 533 (1987). On that prior occasion, this Court held that superintending the discovery process is a "delicate task," one where the "exact line between reasonableness and unreasonableness in each case must be drawn by the trial court." *Id.* at 546. The Court should reaffirm that holding here.

a. Post-judgment discovery pursuant to Federal Rule of Civil Procedure 69 is broad, as is a district court's "discretion" to manage the discovery process. *First City, Texas-Houston, N.A.* v. *Rafidain Bank (Rafidain II)*, 281 F.3d 48, 54 (2d Cir. 2002). Evaluated in context, the district court's discovery order is not an abuse of discretion. Perhaps in recognition of that fact, Argentina's challenge is not directed to the district court's discretionary determinations. Argentina's challenge is directed to the district court's "subject matter jurisdiction." *Id.* According to Argentina, the discovery order "violates the FSIA by requiring disclosure about assets Argentina claims are immune from attachment." Pet. App. 12. The Second Circuit rightly rejected the proposition that the Foreign Sovereign Immunities Act (FSIA) imposes a categorical constraint on post-judgment discovery.

b. Argentina's argument that special discovery rules should apply to foreign sovereign entities simply has no legal basis. The text of the FSIA undermines Argentina's argument, the legislative history of the FSIA contradicts it, and Rule 1 of the Federal Rules of Civil Procedure forecloses it. If anything, the need for Rule 69 discovery is all the more acute in FSIA cases. Argentina's proposed rule would put NML "in the position of having to demonstrate jurisdiction over specific property, unassisted by discovery, in order to obtain the very discovery that is likely needed * * * to make such a jurisdictional showing." Tyler B. Robinson & Erin Bradrick, *Judgment Enforcement in the United States Against Sovereign States: Some Interesting Procedural*

Questions, 4 Disp. Resol. Int'l 151, 158 (2010). That is patently unreasonable.

c. American companies have investments abroad that amount to several billion dollars, and those investments are sometimes jeopardized by foreign sovereign entities who flout their contractual commitments. The chief purpose of the exceptions to sovereign immunity embodied in the FSIA is to ensure that American companies have legal recourse for breaches of contract by foreign sovereign entities. Rule 69 discovery plays a critical role in contract enforcement, and promotes economic development by protecting property rights.

ARGUMENT

POST-JUDGMENT DISCOVERY PURSUANT TO RULE 69 IS CRITICAL TO ENFORCING CONTRACTS BETWEEN AMERICAN COMPANIES AND FOREIGN SOVEREIGN ENTITIES.

"A district court has broad latitude to determine the scope of discovery and to manage the discovery process." Pet. App. 13. In recognition of this broad latitude, a district court's discovery orders are reviewed only for "abuse of discretion." Pet. App. 12.

Foreign sovereign entities have sought to impose limits on that broad discretion before. In *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 526 (1987), a French government-owned company argued for a special rule requiring that any discovery served upon it must comply with the Hague Convention. The Court declined that invitation to "articulate specific

rules to guide this delicate task of adjudication." *Id.* at 546. Instead, it held that the "exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties." *Id.* The Court should reaffirm that holding here.

A. Rule 69 Discovery Is Broad And Context-Dependent.

1. Federal Rule of Civil Procedure 69 provides that a "judgment creditor * * * may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). The cases applying Rule 69 are clear that Rule 69 discovery "is very broad." 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3014 (2d ed. 2013). *See, e.g.*, *Libaire* v. *Kaplan*, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011) (collecting cases); *ClearOne Commc'ns, Inc.* v. *Chiang*, 276 F.R.D. 402, 404 (D. Mass. 2011) (same).

Nevertheless, Argentina maintains that no court may order post-judgment discovery of its property "beyond the court's limited enforcement authority." Pet. Br. 29. According to Argentina, to the extent its property is "immune from attachment arrest and execution" under Section 1609 of the Foreign Sovereign Immunities Act (FSIA) (which in turn is subject to exceptions spelled out in Sections 1610 and 1611), it is to that same extent immune from Rule 69 discovery. *See* 28 U.S.C. §§ 1609-1611. This position is "quite confusing," *FG Hemisphere* v. *Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir.

2011), because it conflates discovery in aid of a judgment with the execution of a judgment. *See id.* The FSIA makes no mention of any purported *discovery* immunity. *Id.* at 378. This Congressional silence is significant. *See Carcieri* v. *Salazar*, 555 U.S. 379, 392 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

"[W]here subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case." *First City, Texas-Houston, N.A.* v. *Rafidain Bank (Rafidain II)*, 281 F.3d 48, 54 (2d Cir. 2002). And because the district court has broad discretion "in all matters relating to discovery," it may act to "limit discovery in a prudential and proportionate way." Pet. App. 14; *see also* Tyler B. Robinson & Erin Bradrick, *Judgment Enforcement in the United States Against Sovereign States: Some Interesting Procedural Questions*, 4 Disp. Resol. Int'l 151, 158 (2010) (explaining that the "Second Circuit's approach to the scope of discovery available in aid of judgment enforcement under the FSIA" must be understood "in terms of discretion, rather than jurisdiction"). That consistent approach of the Second Circuit is correct and should be affirmed.

2. The district court's discovery order, and the court of appeals decision affirming it, should be evaluated in the context of the entire case. *See Société Nationale*, 482 U.S. at 546 (holding that a district court must be empowered to draw lines in discovery "based on its knowledge of the case and of the claims and interests of the parties"). As the court with the

closest view of the case, the district court granted NML's motion to compel compliance with the discovery order in part due to Argentina's intransigence. Pet. App. 45. Argentina's intransigence was nothing new to the district court or the court of appeals in this long-running litigation. *See EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) ("Argentina has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what we might term a diplomacy of default."); *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 304 (S.D.N.Y. 2010), *vacated sub nom. NML Capital, Ltd.* v. *Banco Cent. de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011) ("What is going on between the Republic of Argentina and the federal court system is an exercise of sheer willful defiance of the obligations of the Republic to honor the judgments of a federal court.").[2]

3. It is in this context that the court of appeals affirmed the discovery order to which Argentina objects. The court of appeals made several crucial findings in the decision below. First, it found that the district court "sought to limit the subpoenas to discovery that was reasonably calculated to lead to attachable property." Pet. App. 7-8. Second, it found that NML "agreed to enter into a protective order"

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[2] Argentina's "diplomacy of default" and "willful defiance" are particularly inexcusable given the Fiscal Agency Agreement Argentina made concerning the debt instruments at issue here. In that Agreement Argentina "irrevocably waived" and "irrevocably agreed not to claim" immunity "from execution of a judgment or from any other legal or judicial process or remedy." J.A. 106.

that would safeguard the confidentiality of sensitive information. Pet. App. 7. Third, it found that Argentina's appeal does not concern the "parameters of the document requests." Pet. App. 11 n.5. Instead, "Argentina's appeal concerns only the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity." Pet. App. 10 n.5.

Argentina's appeal concerns, in other words, not the details of how the district court exercised "its discretion," but rather the scope of its "subject matter jurisdiction." *Rafidain II*, 281 F.3d at 54. This means that Argentina may not prevail before this Court merely by quibbling with the particulars of how the district court "determine[d] the scope of discovery." Pet. App. 13. Argentina must demonstrate that in entering the discovery order the district court exceeded its subject matter jurisdiction. This Argentina cannot do.

B. Interpreting The FSIA To Impose a Categorical Constraint On Post-Judgment Discovery Would Rob Rule 69 Of Its Effectiveness.

1. Post-judgment discovery pursuant to Rule 69 "is very broad." Wright & Miller, § 3014; *cf. Peacock* v. *Thomas*, 516 U.S. 349, 359 (1996) ("To protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution.") (citing FED. R. CIV. P. 69(a) and 62(a)). "The judgment creditor is allowed discovery to find out about assets on which execution can issue or about assets that have been fraudulently transferred or are otherwise beyond the reach of

execution." Wright & Miller, § 3014. Rule 69 discovery must be broad "if the procedure is to be of any value." *Id.*

In line with the settled law just described, the court of appeals concluded that "broad post-judgment discovery in aid of execution is the norm in federal * * * courts." Pet. App. 13. Other circuits have joined the Second. *See, e.g., Nat'l Serv. Indus., Inc.* v. *Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located."); *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992) (ordering compliance with post-judgment discovery into a foreign sovereign entity's "assets worldwide").

The only circuit to endorse Argentina's position is the Seventh, which has held that to obtain post-judgment discovery against a foreign sovereign entity a plaintiff must identify "specific property that is subject to attachment." *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011). Post-judgment discovery is then "limited to the specific property the plaintiff has identified." *Id.* The United States puts forward the same position as *amicus curiae* in support of Argentina. U.S. Br. 9. The Second Circuit has crisply formulated the fundamental flaw in this position: Argentina "is challenging the court's subject matter jurisdiction, not its discretion." *Rafidain II*, 281 F.3d at 54 (2d Cir. 2002).

But "there is not a smidgen of indication in the text of the FSIA that Congress intended" FSIA cases to be treated any differently than others for purposes of

Rule 69. *FG Hemisphere*, 637 F.3d at 378. To the extent looking beyond the text of the statute is merited, the relevant legislative history similarly "demonstrates that Congress kept in place a court's normal discovery apparatus in FSIA proceedings." *Id.* Approaching the question from the other side, Rule 1 of the Federal Rules of Civil Procedures provides that those Rules "govern the procedure in all civil actions and proceedings in the United States district courts." FED. R. CIV. P. 1. And judges should not select certain categories of civil cases for special treatment under the Federal Rules. *Cf. Ashcroft* v. *Iqbal*, 556 U.S. 662, 684 (2009) (holding that the Rule 8 pleading standard "applies to antitrust and discrimination suits alike").

2. If anything, the need for Rule 69 discovery is all the more acute in FSIA cases. Claiming sovereign immunity enables a judgment debtor like Argentina to be a "recalcitrant debtor." Robinson & Bradrick, at 158. Argentina has "very carefully guarded from creditors" crucial information about "the existence, location, and kinds of property a creditor might reach." *Id.* In these circumstances, and given Argentina's long and undistinguished track record, it is hard to see how NML can obtain the crucial information it needs to enforce its judgments against Argentina "other than with the assistance of a court through discovery." *Id.* After all, NML bears the burden of "identifying specific, recoverable assets" of Argentina's before it can collect on its judgments under the FSIA. *Walters* v. *Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011). If Argentina's effort to impose a categorical constraint on post-judgment discovery were to suc-

ceed, NML would be "put in the position of having to demonstrate jurisdiction over specific property, unassisted by discovery, in order to obtain the very discovery that is likely needed * * * to make such a jurisdictional showing." Robinson & Bradrick, at 158.

Interpreting the FSIA to impose a categorical constraint on post-judgment discovery would enervate NML, and would conversely (and perversely) empower Argentina to continue its recalcitrant ways. Argentina alone would become the "arbiter of what property is or is not within the statutory exceptions to immunity from attachment and execution." *Id.* Argentina alone could shield its assets from discovery, and from further proceedings related to attachment. And Argentina would be elevated to this position of strength because NML would have "no ability"—and a court "no jurisdiction"—"to obtain the discovery necessary to independently test or litigate the issue." *Id.*

"Discretion to permit discovery of a sovereign debtor's property to the same extent as that of any judgment debtor permits the kind of discovery likely necessary, as a practical matter, to successfully locate specific assets and establish that they satisfy the FSIA's requirements." *Id.* at 158-159. The consequence of ruling for Argentina would be to render foreign sovereign entities effectively beyond the reach of Rule 69, and thus effectively beyond the reach of the rule of law. *See Peacock*, 516 U.S. at 356 ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.' ")

(quoting *Riggs* v. *Johnson Cnty.*, 73 U.S. (6 Wall.) 166, 187 (1868)).

C. Rule 69 Discovery Is Critical To Enforcing Contracts Between American Companies And Foreign Sovereign Entities.

1. U.S. residents—"primarily companies"—have invested nearly five billion dollars abroad. Central Intelligence Agency, *The World Factbook* (2013).[3] Alongside this increase in foreign direct investment, the last century has seen "a sharp rise in international commerce being conducted by state-owned enterprises." J.F. Hulston, Note, *Chinese Assault Rifles, Giant Pandas, and Perpetual Litigation: The "Rights Without Remedies" Dead-End of the FSIA*, 77 Mo. L. Rev. 511, 519 (2012). The United States enacted the FSIA in no small part because of this rise in international commerce. *Id.* at 519-520; *see also Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612 (1992). Section 1603 of the FSIA provides that "an agency or instrumentality of a foreign state" is among the class of entities that enjoys sovereign immunity under Section 1604. 28 U.S.C. § 1603; *see also Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473 (2003). Encompassed within that class of foreign sovereign entities are (among others) airlines, insurance companies, steel companies, oil companies, and hotels. Michael L. Morkin, Ethan A. Berghoff, & Richard S. Pike, *Doing Business with Foreign Sovereign Entities*, 17 Business Law Today (2007).[4]

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[3] *Available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2199rank.html.

[4] *Available at* http://apps.americanbar.org/buslaw/blt/ 2007-11-12/pike.shtml.

A ruling for Argentina would make it even harder than it already is to enforce judgments against this broad array of foreign sovereign entities. That can only deter foreign direct investment and international commerce. *See* David P. Vandenberg, Comment, *In the Wake of* Republic of Austria *v.* Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. Colo. L. Rev. 739, 744 (2006) ("American businesses might be dissuaded from entering agreements with foreign state-owned enterprises if they knew those enterprises could successfully claim immunity in American courts. That immunity would leave the American businesses with no legal recourse for breaches of their contracts."). American manufacturers employ nearly 12 million men and women, *see* Bureau of Labor Statistics, *Current Employment Statistics* (2014),[5] and contribute more than $2 trillion to the U.S. economy annually, *see* Bureau of Economic Analysis, *Industry Economic Accounts* (2012).[6] American manufacturers, and American companies more generally, are only now starting to regain the business confidence that spurs investment. A.T. Kearney, *Back to Business: Optimism Amid Uncertainty* 2 (2013).[7] This business confidence was sapped by the global recession, and its continued return should not be taken for granted. *Id.* at 4.

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[5] *Available at* http://www.bls.gov/ces/.

[6] *Available at* http://www.bea.gov/industry/index.htm#annual.

[7] *Available at* http://www.atkearney.com/documents/10192/1464437/Back+to+Business+-+Optimism+Amid+ Uncertainty+-+FDICI+2013.pdf/96039e18-5d34-49ca-9cec-5c1f27dc099d.

Decreased foreign direct investment and international commerce benefits no one. It certainly does not benefit American manufacturers, their employees, or the U.S. economy. But it also does not benefit foreign sovereign entities shortsightedly asserting immunity. In this case, Argentina agreed to irrevocably waive its sovereign immunity against its creditors. J.A. 106. Presumably Argentina did this to secure credit on more favorable terms than it could have negotiated without that waiver. Ultimately, both American companies and foreign sovereign entities will fare best when courts stand ready to "protect property rights," and thereby promote "economic development." The World Bank, *Economic Development and the Quality of Legal Institutions* (2005).[8]

2. A ruling for Argentina would make it even harder than it already is to enforce judgments against foreign sovereign entities because it would effectively resurrect the absolute theory of foreign sovereign immunity. The purpose of enacting the FSIA was to codify the " 'restrictive' theory of foreign sovereign immunity." *Weltover*, 504 U.S. at 612. A defining feature of the restrictive theory of foreign sovereign immunity is that, unlike the absolute theory, it "would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Id.* at 614. When foreign sovereign entities participate in the marketplace, their counterparties must have confidence that the law has established the "clear and enforceable property rights" of both parties. THE WORLD BANK.

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[8] *Available at* http://go.worldbank.org/0ZCMTT4NE0.

"Indeed, current research suggests that the capacity of national institutions to protect property rights * * * may be decisive in determining whether economic development takes place." *Id.*

Section 1604 of the FSIA provides that foreign sovereign entities "shall be immune from the jurisdiction of the courts of the United States," subject to the exceptions spelled out in Sections 1605 to 1607. 28 U.S.C. § 1604. Three of the exceptions to sovereign immunity spelled out in Section 1605 are of particular importance, because each exists to promote economic development by protecting property rights. The first is that foreign sovereign entities may waive their immunity. *See* 28 U.S.C. § 1605(a)(1). The second is that foreign sovereign entities possess no immunity for commercial activities that are connected to the United States in specified ways. *See* 28 U.S.C. § 1605(a)(2). The third is that foreign sovereign entities are not immune from certain arbitration awards confirmed in the United States. *See* 28 U.S.C. § 1605(a)(6). United States courts have adjudicated cases illustrating each of these exceptions to sovereign immunity. The cases confirm that when foreign sovereign entities fail to respect the property rights of their counterparties, Rule 69 discovery is critical to ensuring that those rights are enforceable.

Take, for example, this case. Argentina waived its sovereign immunity, and is a judgment debtor to NML in the amount of well over a billion dollars. Pet. App. 4. NML's continuous legal efforts to enforce its contractual rights date back to 2003. *Id.* The Southern District of New York has characterized Argentina's response to those efforts as one of "will-

ful defiance." *EM Ltd.*, 720 F. Supp. 2d at 304. For another example, in a D.C. Circuit case the plaintiff "sought judicial recognition" of two "arbitration awards against" the Democratic Republic of Congo (DRC). *FG Hemisphere*, 637 F.3d at 375. Like Argentina, the DRC responded to discovery orders with "obdurate refusal." *Id.* at 377. Finally, the district court was forced to find "the DRC in civil contempt." *Id.* at 376. And in a Ninth Circuit case, a Chinese company engaged in commercial activity in the United States by contracting for the purchase of timber. When this transaction fell through the Chinese company was left facing an over $2 million default judgment, and the plaintiff was left facing an "absence of other sources for the information" it needed to "enforce the judgment." *Richmark*, 959 F.2d at 1476. The plaintiff then turned to the court for discovery in aid of enforcing the judgment, but the Chinese company was no more compliant with discovery than it had been with the judgment itself; indeed, an affiliate of the Chinese company "closed its United States office and left the country after being served with a subpoena." *Id.* at 1476 n.9.

Two lessons can be drawn from these cases. First, foreign sovereign entities often do not voluntarily comply with valid judgments. Second, judgment creditors of those foreign sovereign entities cannot execute judgments when they do not know "the existence, location, and kinds of property" available to satisfy said judgments. Robinson & Bradrick, at 158. Affirming the court of appeals is critical to contract enforcement, and thus to the American companies that rely on robust contract enforcement

to realize their investment-backed expectations in international commerce.

CONCLUSION

For the foregoing reasons, and for those in NML Capital's brief, the judgment below should be affirmed.

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AMICUS CURIAE BRIEF

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BRIEF OF SOUTH CAROLINA AND 20 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are States that have invested billions of dollars in foreign sovereign debt through their public pension funds. Those investments will be seriously jeopardized—and State budgets may be severely impacted as a result—if the Court accepts the extreme proposition urged by the Republic of Argentina here: that foreign sovereigns may attract investors with the false promise that their debts will be enforceable in U.S. courts, only to change the rules and thwart enforcement when it comes time to collect on those debts.

State pension funds collectively hold at least $5.2 billion in direct investment in foreign sovereign debt.[1] In addition, state pension funds have significant investments in managed funds that hold sovereign debt.[2]

These pension funds could suffer tremendous losses if the Court accepts Argentina's position. And in some jurisdictions those losses could be passed on directly to state taxpayers, because most public pen-

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[1] This figure is based on financial reports issued by the 57 largest public pension funds, and thus likely underestimates the funds' collective sovereign-debt holdings, as many funds do not disclose such holdings.

[2] For example, the South Carolina Retirement System alone has invested more than $830 million in emerging market debt funds that invest a substantial portion of their holdings in emerging market sovereign debt. *See* South Carolina Retirement System Investment Commission, *Annual Investment Report* 11 (2013), *available at* http://www.ic.sc.gov/Reporting/AIR/PDFs/2013annualreport.pdf (visited Mar. 15, 2014).

sions guarantee defined benefits to public employees, regardless of the performance of the investments. *See, e.g.*, Jack M. Beermann, *The Public Pension Crisis*, 70 Wash. & Lee L. Rev. 3, 4-5 (2013); Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 Ind. L.J. 189, 199 (2012).

Moreover, many Americans have invested their own private funds in foreign sovereign debt, either directly or through mutual funds and retirement accounts. The States have an interest in protecting the economic well-being of their residents. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

SUMMARY OF THE ARGUMENT

Many foreign sovereigns—particularly those with emerging economies or troubled financial pasts—are able to access affordable capital from U.S. investors, *only* if they agree to waive sovereign immunity and thereby allow their debts to be enforced in U.S. court. That is precisely what the Republic of Argentina did here. And the arrangement benefits everyone involved. It gives investors confidence in the foreign sovereign debt market. It increases the capital available to foreign sovereigns. It promotes international capital markets and supports a robust secondary market for sovereign debt.

The arrangement works, however, only if U.S. courts hold foreign sovereigns to their word. By waiving sovereign immunity, the foreign sovereign agrees to subject itself to judicial process in U.S. court, pursuant to the Federal Rules of Civil Procedure. That includes post-judgment discovery under Rule 69. For example, if—as here—a foreign sovereign defaults on its debt and attempts to conceal its

assets, state pension funds and other U.S. creditors can pursue post-judgment discovery under Rule 69 to locate those assets.

According to Argentina, however, foreign sovereigns are not subject to post-judgment discovery under Rule 69—despite its prior waiver of sovereign immunity—unless the creditor identifies the assets *in advance*. This artificial limitation on Rule 69 has no basis. To the contrary, it squarely conflicts with the sovereign's agreement to waive its immunity. And it destroys the purpose of post-judgment discovery under Rule 69.

Argentina's position boils down to this: State pension funds and private investors can obtain paper judgments against foreign sovereigns—but they cannot actually have any meaningful opportunity to enforce them against a recalcitrant sovereign. This position should be troubling to creditors and debtors alike in the foreign sovereign debt market. It is certainly troubling to the state public pension funds who have invested billions on the assurance that U.S. courts will hold foreign sovereigns to their legal commitments.

ARGUMENT

I. States Have Invested Billions of Dollars Based On The Assurance That Foreign Sovereign Debt Is Subject To The Protection Of U.S. Courts.

The Republic of Argentina sold billions of dollars of its sovereign debt to state pension funds and other investors around the world, with more than a mere promise to repay principal with interest. It made specific assurances that, in the event of default, in-

vestors would be able to protect their investments in U.S. courts.

Moreover, Argentina articulated those assurances in the broadest of terms. Argentina agreed to "irrevocably waive[]" "any immunity from suit, . . . from attachment prior to judgment, . . . from execution of a judgment or from any other legal or judicial process or remedy." Pet. App. 4 n.1. It agreed to do so "to the fullest extent permitted by the laws of such jurisdiction." *Id.* And it "consent[ed] generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment." *Id.*

Argentina made these assurances for good reason. Enforcement of foreign debt obligations in U.S. court benefits investors and foreign sovereigns alike. It gives confidence to investors by facilitating the smooth functioning of foreign sovereign debt markets, and it provides foreign sovereigns with access to affordable capital.

A. Judicial Process in U.S. Courts Promotes Investor Confidence In The Smooth Functioning of Foreign Debt Markets.

The market for foreign sovereign debt obligations well exceeds __ billions of dollars. *See, e.g.*, David Reilly, *Euro Pain Could Blow Back on Big U.S. Banks*, Wall St. J., May 14, 2010, at B14. State pension funds alone have invested billions in foreign sovereign debt, both directly and through managed funds. *See, e.g.*, South Carolina Retirement System Investment Commission, *Annual Investment Report* at 11 (2013), *available at* http://www.ic.sc.gov/

Reporting/AIR/PDFs/2013annualreport.pdf (visited Mar. 15, 2014).

States thus have a vital interest in protecting their investments in foreign sovereign debt—and stand to suffer massive losses in the event they are unable to do so. Moreover, those losses could be suffered directly by state taxpayers, because most public pensions guarantee defined benefits to public employees, regardless of the performance of the investments. *See* Beermann, *supra*, 70 Wash. & Lee L. Rev. at 4-5; Slater, *supra*, 87 Ind. L.J. at 199. Put simply, if a foreign state can unilaterally refuse to pay its debts, States will come under enormous hardship to cover the costs of education, infrastructure, and public safety.

In light of the considerable stakes involved, state pension funds and other investors routinely demand that foreign states waive their sovereign immunity to suit in U.S. court, as a condition of investing in foreign sovereign debt. Investors rely on U.S. courts to enforce these waivers. *See Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d. Cir. 1984); *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992). And such judicial enforcement achieves a number of significant objectives for investors: It discourages opportunistic default; it encourages voluntary negotiations in the event of default; and it protects liquidity by fostering a robust secondary market for sovereign debt.

1. Absent U.S. court enforcement, many foreign sovereigns might be tempted to engage in "opportunistic default." Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory L.J. 1043,

1050 (2004). "Throughout history, countries have indeed defaulted during bad times, but they have also suspended payments when domestic economic conditions were highly favorable." Michael Tomz and Mark L. J. Wright, *Do Countries Default in "Bad Times"*, 5 J. Eur. Econ. Assoc. 352, 359 (2007).

"The only effective remedy" against opportunistic default "is to allow creditors to enforce their contract rights effectively against sovereigns in default." Hal S. Scott, *Sovereign Debt Default, Cry for the United States, Not Argentina* 1 (Washington Legal Foundation 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf (visited Mar. 15, 2014). "If sovereign debtors expect that creditors . . . will enforce their claims through litigation, then they may be less likely to default when they are able to make the payments required on their debts." Fisch & Gentile, *supra*, 53 Emory L.J. at 1099-100.

2. The threat of U.S. court enforcement also facilitates voluntary restructuring. Investors rely on the threat of litigation to keep defaulting debtors at the negotiating table and thereby ensure that restructuring remains voluntary. "When a restructuring becomes inevitable, debtors and creditors should engage in a restructuring process that is voluntary and based on good faith." Institute for International Finance, Inc., *Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets* 13 (Mar. 31, 2005), *available at* http://www.iif.com/download.php?id=4fyB5BGIKzU= (visited March 15, 2014).

The United States has long agreed that "creditor participation in such negotiations should be on a strictly voluntary basis." *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir.

1997). *See also* Br. for Republic of France as *Amicus Curiae* in Support of the Republic of Argentina's Petition for a Writ of Certiorari 3, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-194 (July 26, 2013); Br. of U.S. as *Amicus Curiae* in Support of Reversal 9, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105 (2d Cir. Apr. 4, 2013). Preserving the "voluntary" nature of these negotiations means that investors must have a meaningful "right to withdraw" and "reject[t] . . . terms of [a] settlement" that they find "unacceptable." *Turkmani v. Republic of Bolivia*, 193 F. Supp. 2d 165, 182 (D.D.C. 2002). *See also Elliott Assocs. L.P. v. Banco de la Nacion*, 194 F.3d 363, 376 (2d Cir. 1999).

Instead of engaging in voluntary negotiations, Argentina has adopted a "unilateral and coercive approach to [its] debt restructuring." Moody's Investor Service, *Sovereign Defaults Series: The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings*, at 2 (Apr. 10, 2013). After years of refusing to negotiate with investors—despite a significant economic recovery shortly after its default, *see* Scott, *supra*, at 4—Argentina made a take-it-or-leave it offer of "25 to 29 cents on the dollar," backed by the threat to permanently withhold payment from those who refused. *NML Capital, Ltd. v. Argentina*, 699 F.3d 246, 252 (2d Cir. 2012).

If courts do not diligently enforce creditors' rights, Argentina's uniquely coercive approach to restructuring threatens to become the norm. "The very harsh way that Argentina has dealt with its bondholders, despite the substantial recovery of its ability to service its contractual obligations, has set a troubling precedent for other sovereign debtors in future financial straits." Arturo C. Porzecanski, *From*

Rogue Creditors to Rogue Debtors: Implications of Argentina's Default, 6 Chi. J. Int'l L. 311, 331 (2005). As one Argentine official announced in the wake of Argentina's 2005 restructuring, "[t]he rules of the game have changed." Larry Rohter, *Argentina Announces Deal on Its Debt Default*, N.Y. Times, Mar. 4, 2005 at C1. Under these new rules, as Argentina would have them, investors would be powerless to protest when a foreign sovereign brazenly lowballs its creditors by offering dimes on the dollar for what it owes. "Voluntary" restructuring in such an environment would be impossible.

Preserving investors' rights in court would discourage other foreign sovereigns from following Argentina's lead: "[l]itigation . . . operate[s] as a check on the terms of a proposed restructuring, giving a creditor recourse against a restructuring that provides insufficient value to creditors or that unduly favors some creditors over others." Fisch & Gentile, *supra*, at 1050-51.

3. Finally, the refusal to hold sovereigns to their waivers could imperil the secondary market for sovereign debt. "A well-developed market of secondary purchasers of defaulted sovereign debt . . . provides incentives for primary lenders"—such as state pension funds—"to continue to lend to high-risk countries." *Elliott*, 194 F.3d at 380. *See also Turkmani*, 193 F. Supp. 2d at 181-82. Without a robust secondary market, primary lenders "would have substantial difficulty selling [bond] instruments if payment were not voluntarily forthcoming," which would "add significantly to the risk of making loans to developing nations with poor credit ratings." *Ibid.* Strengthening the secondary market means that, if a sovereign defaults, primary lenders can choose

whether to accept a foreign sovereign's restructuring offer or sell their bonds at a rate that reflects secondary purchasers' ability to collect on the debt. But the secondary market requires that courts hold sovereigns to their waivers of immunity. Increasing secondary purchasers' ability to identify attachable assets thus translates to greater payouts to primary lenders that choose to cut their losses.

B. Judicial Process in U.S. Courts Also Benefits Foreign Sovereigns And Enhances U.S. Leadership In Global Markets.

By holding sovereigns to their waivers, courts also protect international capital markets, improve developing countries' access to capital, and fortify the United States' preeminent role in global finance.

1. Protecting investors' bargained-for rights is "essential to the integrity of the capital markets." *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013). "Experience shows that debt markets work best when the rights of creditors are protected most effectively." Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 Am. Econ. Rev. 85, 85 (2003). Strong creditors' rights encourage investor confidence in the bond market, increasing investment and bringing additional capital to emerging markets while also lowering the cost of capital.

Indeed, emerging economies such as Argentina's rely on capital from foreign investors to finance economic growth and to provide basic services to their citizens. Thus, while court decisions favoring sovereign borrowers over lenders may benefit individual foreign sovereigns in the short term, the long-term interests of foreign economies are best served by pro-

tecting investors and thus encouraging investment. *See Elliott*, 194 F.3d at 380; *cf.* Alexander Hamilton, *First Report on the Public Credit* (Jan. 14, 1790), in 2 *The Works of Alexander Hamilton* 227, 228 (Henry Cabot Lodge ed. 1904) ("[W]hen the credit of a country is in any degree questionable . . . it never fails to give an extravagant premium, in one shape or another, upon all the loans it has occasion to make."). If sovereign debt agreements prove unenforceable, sovereigns with a poor history may find themselves walled off from financial markets altogether.

2. Moreover, diluting creditors' rights may cause the United States to lose its leading role in international capital markets, and particularly in the financing of emerging market sovereign debt. *See Allied Bank*, 757 F.2d at 521. As of 2009, "a large majority of outstanding emerging-market bonds issued in international markets" were governed by the laws of U.S. jurisdictions. Udaibir S. Das *et al.*, *Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts* 41 (IMF Working Paper WP/12/203, August 2012). To preserve that trend, "[t]he United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law." *Allied Bank*, 757 F.2d at 521-22; *see also Weltover*, 941 F.2d at 153. "Th[at] interest—one widely shared in the financial community— . . . is advanced by requiring debtors, including foreign debtors, to pay their debts." *NML*, 727 F.3d at 248. Indeed, even Argentina's oft-cited professor Mitu Gulati (*see, e.g.*, Pet. for Writ of Cert., *Republic of Argentina v. NML*

Capital, Ltd., No. 13-990, 9, 33 (Feb. 18, 2014)) recently predicted that investors could "embrace" efforts to strengthen enforcement of sovereign debt contracts and pay a premium for debt issued in the "one jurisdiction [the United States] that is willing to try to protect their rights." Tracey Alloway *et al.*, *BNY Mellon joins Argentina spat*, Financial Times (Dec. 4, 2012). The United States' predominant role in global finance thus depends on the willingness of courts to hold sovereign-debt issuers to their contracts.

II. ARGENTINA SECURED BILLIONS OF DOLLARS OF CAPITAL BY SUBMITTING TO SUIT IN U.S. COURT—SO IT MUST NOW ADHERE TO U.S. JUDICIAL PROCESS.

The Republic of Argentina benefited tremendously when it sold billions of dollars of its sovereign debt based on its explicit assurance that it would not invoke sovereign immunity in U.S. court in the event of default. Having done so, Argentina is now subject to ordinary judicial process in U.S. court, pursuant to the Federal Rules of Civil Procedure.

Argentina's broad waiver of sovereign immunity, once granted, cannot be "withdraw[n]." 28 U.S.C. §§ 1605(a)(1), 1610(a)(1). *See also* H.R. Rep. 94-1487 at 18, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6617 ("[A] foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally."). Nor can Argentina hide behind the Foreign Sovereign Immunities Act. As the Act's legislative history makes clear, Congress understood that the FSIA "does not attempt to deal with questions of discovery." H.R. Rep. No. 94-1487, at 23 (1976), *re-*

printed in 1976 U.S.C.C.A.N. 6604, 6621; *Samantar v. Yousuf*, 560 U.S. 305, 328 (2010) (Scalia, J., concurring).

To be sure, if Argentina had wished to reserve additional protections, rather than submit to the ordinary rules of procedure, they could have tried to do so. *Cf. In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1246 (3d Cir. 1994) (foreign sovereigns can hire "competent lawyers to draft and review their contracts and thereby insure that [their] rights [as sovereigns] are not inadvertently compromised."). But such an explicit reservation of rights would have also alerted investors to additional investment risks—and raised the cost of capital to Argentina accordingly. So instead, Argentina did precisely the opposite: It offered investors a broadly worded waiver of sovereign immunity (Pet. App. 4 n.1)—and received better access to global markets and more affordable capital from U.S. and other investors as a result.

"[B]orrowers and lenders may . . . negotiate mutually agreeable terms for their transactions"—and then they must be "held to those terms." *NML*, 727 F.3d at 248. Investors relied on Argentina's unqualified waiver of immunity in committing billions of dollars to the Argentine treasury. These "settled expectations should not be lightly disrupted"—as this Court has recognized in other areas. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (retroactive application of legislation). For example, under the Takings Clause, federal, state, and local governments may not impose regulations that "interfer[e]"—without compensation—"with distinct *investment-backed expectations*." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)

(emphasis added). Similarly, "the Contract Clause limits the power of the States to modify their own contracts," including state bond agreements. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977). If states cannot repudiate their bond contracts, there is no reason foreign sovereigns should be allowed to do the same.

III. Submission to Suit In U.S. Court Is Meaningless Absent Post-Judgment Discovery Under Rule 69.

Broad post-judgment discovery in aid of execution is essential to enforcing judgments against recalcitrant debtors like Argentina. The "heart of the problem" for investors in foreign sovereign debt is that "it has become exceedingly difficult . . . to actually collect on their debts." Scott, *supra*, at 9. Unless the sovereign debtor will voluntarily pay, creditors will be forced to collect by attaching and selling the debtor's assets. *See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). This task is made more difficult because the FSIA (and analogs in other nations) renders certain of the sovereign debtor's property immune from attachment and execution. *See, e.g.*, 28 U.S.C. §§ 1609- 1611. If creditors are to collect on their judgments, therefore, they must be able to locate assets that are not immune from attachment. *See Walters v. Indus. & Commercial Bank of China*, 651 F.3d 280, 297 (2d Cir. 2011) (requiring creditors to identify assets through discovery prior to attachment). That task requires meaningful post-judgment discovery.

Broad discovery in aid of execution is thus the norm in federal court. Federal Rule of Civil Procedure 69 provides that a "judgment creditor . . . may

obtain discovery" "in aid of . . . execution" of a judgment. "Discovery of a judgment debtor's assets is conducted routinely" under that rule. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 54 (2d Cir. 2002); *see also Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993) ("[T]he remedies of a judgment creditor include the ability to question the judgment debtor about the nature and location of assets that might satisfy the judgment."). "The scope of [such] discovery" must be "very broad to permit a judgment creditor to discover assets upon which execution may be made." *Seven Arts Pictures, Inc. v. Jonesfilm*, 512 F. App'x 419, 425 (5th Cir. 2013); *see also Bank of Am., N.A. v. Veluchamy*, 643 F.3d 185, 188 (7th Cir. 2011) ("The powers available to a district court in a post-judgment proceeding . . . are to be broadly construed, providing the district court with the authority to enter a wide variety of orders to ensure that usable assets are located, seized, and—where appropriate—applied to the judgment."); *United States v. Conces*, 507 F.3d 1028, 1040 (6th Cir. 2007) ("[T]he scope of postjudgment discovery is very broad." (internal quotations omitted)).

The broad remedy of post-judgment discovery reaches "assets held outside the jurisdiction of the court where the discovery request is made," including assets held abroad. Pet. App. 14-15. Discovery as to a judgment debtor's foreign assets is common under both federal and State law, either of which may support discovery under Rule 69. *See, e.g. Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 238-39 (S.D.N.Y. 2011) (subpoena on New York branch of Indian bank "reaches all responsive materials within the corporation's control, even if those materials are located outside New York"); *Raji v.*

Bank Sepah-Iran, 139 Misc. 2d 1026, 529 N.Y.S. 2d 420, 423-24 (Sup. Ct. 1988) (allowing discovery into judgment debtor's foreign assets). "A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, *wherever located*." *Rafidain*, 281 F.3d at 54 (quoting *Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982)) (emphasis added).

Significantly, "the district court's power to order [such] discovery . . . does not derive from its ultimate ability to attach the property in question," but instead "from [the district court's] power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." Pet. App. 16 (citing *Rafidain*, 281 F.3d at 53-54). As this Court has long recognized, "[p]rocess subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs v. Johnson Cnty.*, 73 U.S. 166, 187 (1867).

Rule 69's broad reach is also necessary to prevent debtors from removing attachable assets from the jurisdiction in which a judgment issues. "[Under Rule 69(a),] the judgment creditor must be given the freedom to make a broad inquiry to discover *hidden or concealed assets* of the judgment debtor." *Caisson Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974) (emphasis added). The cost of seeking discovery locally in every jurisdiction where an attachable asset could conceivably be hidden would be prohibitive, and would thus allow a debtor to defeat enforcement simply by removing assets to unexpected locations. That risk is particularly acute in

foreign sovereign debt litigation. Foreign sovereigns are often both distant and powerful, and can easily move assets internationally to defeat collection efforts by investors, just as Argentina has done in this case. *See The Government is Protecting Itself from Attachment*, La Nación (Feb. 5, 2004).

Argentina's efforts to limit this crucial remedy would undermine the ability of investors to enforce foreign sovereign debt contracts. "[T]he purpose of the rules allowing discovery in aid of execution would be defeated if discovery could be directed only to persons already known to possess assets" subject to attachment. Laura Hunter Dietz *et al.*, 30 Am. Jur. 2d § 617 (2014). Requiring judgment creditors to identify assets available to satisfy a judgment *before* obtaining discovery would effectively deprive them of any realistic opportunity to conduct asset discovery. Doing so would unduly impede enforcement of foreign sovereign debt obligations and further encourage sovereign debtors to remove attachable assets from the United States.

CONCLUSION

To protect the bargained-for rights of investors in foreign sovereign debt, this Court should hold that the FSIA does not limit post-judgment asset discovery under Rule 69.

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